On October 25, 1867, Sturm sailed from New York for Mexico, upon the steamer "Wilmington" to personally receive his cargoes and to attend to their sale upon arrival. He took with him upon the steamer other like military goods. The steamer and her cargo reached destination in safety, but the Keese, on October 13, 1867, foundered in a storm in the Gulf of Mexico and her cargo was lost. The Blonde also experienced a rough voyage, lost part of her cargo, the remainder reaching Mexico in a damaged condition. The loss of the Keese was not known in New York when Sturm sailed, he learning of it first, upon his arrival in Havana, on the 1st day of November, when he telegraphed the information to New York.

On each of the three vessels were goods owned by Sturm and also goods of Boker & Co., taken by Sturm on consignment. Sturm insured the entire of the cargoes of the Keese and Blonde in his own name, gave his notes for the premiums, and, before the loss occurred, transferred certain of the policies, by endorsement, to Boker & Co. These two cargoes were valued by Sturm at about two hundred thousand dollars. The consigned goods of Boker & Co., upon the Keese, were of the invoice value of $29,327, and on the Blonde, $10,560.60; both in gold at forty-five per cent. premium.

Sturm returned from Mexico in the spring of 1868, arriving in New York on the 5th day of March. The insurance companies about that time expressed a determination to resist the payment of the insurance on the Keese cargo, basing their refusal upon various grounds: over valuation, known unseaworthiness of the vessel when she sailed, that the insured goods in whole or in part were not upon the vessel when she went down, but had been secretly sent to Mexico in some other vessel, that the ship had been scuttled, etc. This necessitated suits against the insurance companies by both Sturm and Boker & Co., and the litigation promised to be prolonged and expensive. (See

Sturm's cross-ex., p. 536, q. 995.) Boker & Co. employed as their counsel, Mr. Charles M. DaCosta, and General Sturm employed as his counsel, Mr. John E. Parsons, both of New York. Actions were brought by DaCosta, in the name of Boker & Co., upon the assigned policies, and by Parsons, in the name of Sturm, upon those not assigned. The printed records from the Superior Court of New York in several of the insurance cases, were submitted to several of the witnesses in the taking of the testimony in this case, and from them it appears that in the case of Funke et. al. *v.* The New York Mutual and Herman Sturm, the summons was dated October 8, 1868; and in Sturm *v.* The Atlantic Mutual, the complaint was sworn to June 26, 1868; and in Sturm *v.* Williams (U. S. Lloyds), the summons was dated July 14, 1868. Mr. Parsons and Mr. DaCosta assisted one another in the several insurance suits.

In March, 1868, Sturm had on deposit, for collection, with Messrs. Winslow, Lanier & Co., bankers in New York, a certain English draft for four thousand pounds, against which he desired to check at once. He transferred this collection from the bank to Boker & Co., and thereby opened with them what was known as his "bank account," against which he, from that time forward, drew his checks or drafts, according to ordinary bank usage, until late in the year 1876, when a rupture occurred in the relations of the parties out of which this litigation sprung.

The litigation with the insurance companies was stubbornly contested, involving as it did numerous appeals, new trials, injunctions, etc., covered over eight years, and was consequently expensive. The last money collected from the insurance was paid over in 1876. A few of the companies never did pay. None paid in full, the amounts received being upon compromises.

The expenses of the several cases were for the most part, upon Sturm's order, paid by Boker & Co., and were in every instance by them charged to Sturm in his bank

account and his pass-book. The proceeds of the assigned policies were, by Boker & Co., credited to Sturm against his consignment account, as were the proceeds from the sale of such of the consigned goods sold in Mexico as came to the hands of the appellees. All other moneys received by Boker & Co. for Sturm's account, including the proceeds of the unassigned policies, were credited by Boker & Co. to Sturm upon his bank account and in his pass-book.

Upon the appellees' theory of the accounts, interest included, Sturm is still liable to them upon both the consignment account, and upon his bank account in considerable sums; while Sturm claims that upon an accounting with Boker & Co., for which he now sues, there was, when he brought this action, a balance of over two hundred thousand dollars owing him from Boker & Co.

This action was begun in the Superior Court of Marion county, Indiana, on the 23d day of April, 1880, and was afterwards, upon petition of defendants, removed into the Circuit Court of the United States for the district of Indiana. In that court the cause was transferred to the equity side, and thereupon the complainant filed his bill of complaint. (Record, p. 2.) The defendants made joint answer under oath (Record, page 25), to which the complainant made reply (Record, p. 90). By stipulation of record the defendants' answer was to be treated also as a cross-bill, and the replication thereto as an answer to the cross-bill. (Record, p. 90.) The defendants made reply to the answer to the cross-bill. (Record, p. 91.)

The taking of testimony began on May 11, 1881—Sturm's first examination—and ended on July 10, 1886, Rabing's last examination.

The cause was heard in the Circuit Court in February, 1887, before the Honorable Walter Q. Gresham, Circuit Judge, and the Honorable William A. Woods, District

Judge, and was held under advisement until the 14th day of May, 1887, when the Court, the District Judge dissenting, dismissed the bill for want of equity, and, the defendants consenting, dismissed the cross-bill without prejudice. (Record, pp. 94–95.) Each Judge pronounced an opinion.

The opinions are found in the record, from pages 95 to 118.

The complainant, on October 31st, 1887, upon leave granted, filed his petition for a rehearing. (Record, p. 118.) By stipulation, the printing of the petition in the record has been waived, and a printed copy furnished to the appellees by the appellant may be used in this appeal. (Record, p. 3974.) The Circuit Court overruled the petition on December 8, 1887, but the overruling order was omitted from the record certified to this Court, and by oversight the mistake was not corrected in a stipulation on that subject. The appellees consent that the copy of this order, printed as an appendix to this brief, may be treated as embraced in the printed record.

The complainant, on April 28, 1888, prayed an appeal herein to this honorable court, and the application was granted upon his filing an appeal bond in the sum of one thousand dollars. (Record, p. 118.) The bond was filed and approved on the 9th day of May, 1889.

The burden of establishing that the evidence does not support the decree dismissing the bill is, of course, upon the complainant and appellant. It is, therefore, deemed that this argument will best aid the court if the appellees confine themselves to answering the appellant's brief.

The bill alleges that the lost goods were consigned to Sturm's care by Boker & Co. on the 18th day of September, 1867, and states in general terms appellant's construction of the contract of consignment without saying how the contract was evidenced or attempting to set out the contract. The explanation for this is that the bill sets up as a basis of recovery not the contract of consignment, but

a new and substantive contract between the parties entered into, as is alleged, upon the 21st and 27th days of March, 1868, relative to the collection by suit of the insurance upon the lost goods, the contribution by the parties to the expense of the anticipated litigation, and the division of the collections. The part of the bill setting up the new contract begins on page 5 of the record, and reads as follows:

"Your orator returned to New York City about March 5, 1868, and soon thereafter it was apparent that the several insurance companies were going to contest the payment of the losses. About March 21, 1868, the defendants agreed with your orator that the goods consigned September 18, 1867, and lost, should be considered as sold to the insurance companies for $40,000, of policies on the schooner 'Keese,' and $15,000 of the policies on the brig 'Blonde.' The loss on the latter vessel was adjusted in May, 1868, as before stated, and nothing was ever collected upon said policies, but, upon the contrary, these parties had to contribute to the general average as aforesaid. It was further agreed that defendants were to sue in their own name upon all the policies transferred to them, and account to the plaintiff for the surplus of $15,000 which they held on the 'Keese.'

"Afterward, on the 27th day of March, 1868, this understanding which was regarded somewhat indefinite, was changed or modified, and it was agreed that in the litigation with the insurance companies the cargo represented by all of the policies on the 'Keese' was to be considered as sold to the insurance companies, and an attorney by the name of Charles M. DaCosta (who had already been engaged by defendants) was to represent defendants, and Mr. John E. Parsons was to represent your orator, and DaCosta was to bring the actions upon the policies transferred to the defendants, and Parsons was to bring the actions upon the policies held by your orator, but that the litigation upon each and all of the policies should be considered a joint fight and for the mutual benefit of all, and both counsel should attend to the mutual interests of all alike, and the spirit of the agreement of September 18 and October 24, 1867, under which the goods were consigned as aforesaid, should be maintained in the suits; and it was

further agreed that this complainant should give his time and attention to the prosecution of the suits and the management of affairs connected therewith for the mutual interests of all, and for convenience it was agreed that complainant should withdraw his bank account from Winslow, Lanier & Co. and deposit his money and keep his bank account with the defendants, so far as possible, and draw on his account for all expenses of the litigation, so far as it could conveniently and reasonably be done, and on all money advanced by complainant he was to be paid interest at the rate agreed upon, to-wit, seven (7) per cent., and in case the defendants should make advances for expenses of the litigation, etc., they were to have interest upon such advances at the same rate. There was no express agreement about what should be the compensation of this complainant for his time and attendance to said litigation, but it was agreed and understood that he should be paid what his services might be reasonably worth, and also be reimbursed for all expenses."

The remainder of the bill purports to relate what was done by the parties in the performance of this new contract, and to show that Sturm gave largely of his time and means to the "joint fight," arranged for in the new contract, and seeks to charge back upon Boker & Co. their *pro rata* share of the expenses and of the value of Sturm's personal services in and about the litigation, etc.

The defendants by their answer specifically denied all of the allegations of the bill setting up the making of the new contract and the doing of the several alleged acts in the performance of that contract, but alleged that the only contract ever existing between them and Sturm was made at the time the lost goods were consigned, and was evidenced by the letters of September and October, 1867, and their accompanying invoices. The answer exhibits Boker & Co.'s itemitized merchandise and bank account with Sturm, embracing every item of debit and credit in both accounts from the commencement of their business acquaintance down to the bringing of this action and shows a large balance then owing to Boker & Co., by Sturm. These

accounts are not attacked as fictitious, false, or as wanting in integrity. Sturm's criticisms of them are limited to certain specific and enumerated items, few in number, and small in amount, as improperly charged to him. (See Record pp. 178, 179, 180, 181 and 914, 915, 928, 929, 930, 932, 946, 947 and 948. See also pp. 3210, 3211 and 3212. See also remarks of Sturm's counsel, p. 395.)

The action proceeds, as we have said, upon the averment in the bill, above quoted, that on March 21 and 27, 1868, the parties entered into the alleged new agreement, respecting the insurance suits. The bill has an exhibit of alleged disbursements by Sturm to the witnesses in those suits (Record p. 11), which on being analyzed, results as follows:

Charles E. Keeny	$7,654 65
Charles B. Hobron	300 00
Henry E. Lubecke	250 00
John I. Smith	1,100 00
W. F. Stocking	11,778 84
Alex. Calderon	757 68
B. F. Mullen	3,145 48
Walter A. Gilson	233 50
James R. Southard	7,095 32
L. G. Fogg	50 00
Wm. Oldering	2,513 00
	$34,878 47

THE PRACTICAL OUTCOME OF THE CONTRACT ON STURM'S THEORY:

First—

The vessel's cargo was insured for the sum of.....		$163,000 00
Of which Boker's firm owned	$29,337 60	
Sturm owned.....	133,662 40	
Together	$163,000 00	
Sturm says that it cost for services and disbursements to recover what was recovered of the insurance of $163,000.00.....		$308,549 89
If this assumption be true, Boker's firm would have to pay, as its *pro rata* of above interests.....	$\frac{29.337-60}{163.000-00}$ viz.:	55,534 44
Sturm would have to pay ...	$\frac{133.662-40}{163.000-00}$ viz.:	253,015 45
		$308,549 89

Second—

The amount of insurance recovered was.....		$109,126 27
Of this Boker's firm is entitled to	$\frac{29.337-60}{163.000-00}$ viz.:	19,641 12
Sturm would be entitled to..	$\frac{133.662-40}{163.000-00}$ viz.:	89,485 15
Together		$109,126 27

STURM'S CONDITION, AS DERIVED FROM HIS PRESENTATION, ASSUMING SUCH PRESENTATION TO BE TRUE, WOULD BE AS FOLLOWS:

Third—Sturm's Adventure—

DR.

Cost of cargo	$133,662 40	
Disbursements and services claimed to have been made by him	$308,549 89	
Together		$442,212 29

CR.

By Boker's firm *pro rata* of above disbursements	$55,534 44	
Pro rata of insurance, $109,126.27, collected by it	89,485 15	
M		$145,019 59
Sturm's loss		$297,192 70

Boker's firm in account with Sturm—

DR.

As above, as shown by M	$145,019 59	
If the firm should pay Sturm all the insurance that it collected, viz.:	109,126 27	
It would still owe Sturm, on his presentation		
N		$35.893 32

Fourth—The Firm's Adventure—

DR.			
Cost of cargo.....	$29,337 60		
Less:			
Firm's *pro rata* of insurance collected by it.....	19,641 12		
Loss in excess of insurance.....		$9,696 48	
Add, *pro rata* of disbursements charged by Sturm		55,534 44	
Which would make firm's total loss...			$65,230 92

Say:

For cost of cargo.....	$29,337 60
For amount claimed by Sturm as due from the firm (in addition to the total amount of insurance, $109,126.27, collected by it, if said amount $109,126.27, were paid to Sturm by it), viz., as shown above (N)	$35,893 32

Making the firm's loss $65,230.92, over and above the whole $109,126.27 to be refunded.

The contract of consignment respecting the lost goods, as set up in the defendant's answer was evidenced by the following letters and invoice. (Record, pp, 26–27.)

"NEW YORK, September 18, 1867.

"*General H. Sturm, Present:*

"DEAR SIR—Enclosed please find our bill of sundry arms, etc., amounting to $39,887.60, for which amount please give us credit on consignment account.

"As mutually agreed, we consign these arms to your care, to be shipped to Mexico and to be sold there by you to the best advantage. Should these arms not be disposed of at the whole amount charged, we have to bear the loss. Should there be any profit realized over the above amount of bill, such profit shall be equally divided between yourself and us.

"Also, it is understood that all these goods are shipped by you free of any expenses to us, and that, in case all or any of them should not be sold, they shall be returned to us, free of all charges.

"As you have insured these goods, as well as other merchandise, we should be pleased to have the amount of $40,000.00 transferred to us. Please acknowledge receipt of this, expressing your acquiescence in above, and oblige,

"Yours truly,

"HERMANN BOKER & Co."

INVOICE (Record, p. 27).

"No deduction allowed for errors or damages unless claim is made within five days after the goods are received."

50 CLIFF STREET, NEW YORK, Sept. 18, 1867.

Hermann Funke,
F. A. Boker,
F. Schumacher. } Folio.....

Mr. H. Sturm, in joint acc't with Hermann Boker & Co.

Payable in gold.

Terms net cash.

Forwarded for your account and risk, per—

1 12-pound battery, brass, complete		$9,000 00	
1 3-rifled	do iron, do	8,000 00	
			$17,000 00

73 cases of 20 ea. } 1,470 Springfield			
1 do of 10 ea. } R. muskets $8.00	$11,760 00		
74 do $3.50..	259 00		
			2,019 00
1,000 rds. fixed ammunition 12 pd., $2.00	2,000 00		
504 rds. fixed ammunition, 24 pd., $2.00	1,008 00		
209 boxes—100,000 Enfield cartridges, $12	1,200 00		
100 boxes—200,000 Maynards, $20.50	4,100 00		
			8,308 00
670 perc. shell, 3 Hotchkiss, $1.25...	837 50		
680 time fuse, 3 " 1.25...	850 00		
270 case shot, 3 " 1.55...	428 50		
180 canister 3 " 1.00...	180 00		
153 boxes, painted, $1.50.....	229 50		
27 boxes, not painted, $1.30.....	35 10		
			2,560 60
			$39,887 60

STURM'S REPLY LETTER. (Record, p. 26.)

"NEW YORK, September 26, 1867.

"*Messrs. Hermann Boker & Co.:*

"GENTS—I have the honor to acknowledge the receipt of your letter of the 18th inst., in which you enclose bill of sundry arms amounting to $39,887.60, consigned to me upon certain conditions contained in said letter.

"In reply I have to say that I accept the terms of said conditions of consignment, and as soon as I obtain the policies of insurance upon said goods, will transfer them to you.

"Very respectfully your o'bt servant,

"H. STURM."

STEAMER WILLMINGTON CONSIGNMENT.

"NEW YORK, October 24, 1867. (Record, p. 35.)

"*General H. Sturm, Present.:*

"DEAR SIR—Enclosed we beg to hand you our bill for muskets, amounting to $10,175.00, for which please give us credit on consignment account.

"As mutually agreed, we consign these arms to your care, to be shipped to Mexico, and to be sold there by you to the best advantage.

"Should these arms not be disposed of at the amount charged, we have to stand the loss. Should there be any profit realized over the above amount such profit shall be equally divided between yourself and us.

" It is also understood that these goods shall be shipped by you free of any expenses to us, and in case they should not find a ready sale, they shall be returned to us free of all charges.

"Please attend to the insurance of this lot, and have the amount transferred to us in one policy. Also please acknowledge the receipt of this, stating your acquiescence in above. We likewise beg to hand you enclosed the San Francisco draft of Placido Vega, $63,699.60, gold, with protest and power of attorney to collect, with legal interest, same attached. We will allow you a commission for collecting this draft and interest for us of ten per cent. off the amount.

" Be kind enough to acknowledge the receipt of this draft.

" Wishing you a pleasant trip and prosperous affairs, we beg to remain,

" Yours truly,
" HERMANN BOKER & CO."

On the same sheet of paper was the following letter: (Record, p. 35.)

" NEW YORK, October 24, 1867.

General H. Sturm:

"DEAR SIR—We beg to refer to our annexed letter, contents of which we expressed according to our mutual agreement. We now beg to say, in order to avoid any misunderstanding hereafter, that with regard to the two lots of new Springfield rifles shipped to your care, viz: 1,470 and 74 cases, 1,000 and 50 cases, we should direct as follows: Should these mentioned arms not bring the prices as charged by us, viz: $8.00 apiece for the first, and $10.00 apiece for the second lot, then we would respectfully request you to have them returned to us free of expenses, as agreed. Please express your acquiescence in above, and oblige.

" Yours truly,
" HERMANN BOKER & CO."

At the complainant's request the defendants agreed of record that the copies of these letters and bills as set out in the defendant's answer might be used as the originals, saving to complainant the right to dispute the words "payable in gold." (Record, p. 271.)

The first question argued by appellant's counsel relates to the construction of the contract evidenced by these letters and invoices. Was Sturm under it liable for the invoice value of the goods lost? His contention is that he was not.

This contention is a departure from the theory of the bill which grounded Sturm's right to recover in this case upon the alleged new contract of March, 1868, and upon that theory the case was tried. This new theory of the case was suggested by the District Judge in his opinion, and from that appellant takes his cue in argument here.

As matter of fact, however, Sturm was liable for the invoice value, in gold, of the lost goods.

Sturm, in his examination of 1881, stated that all previous verbal understandings were in substance expressed in a written contract and he set out these letters and invoices as the contract. (Record, pp. 171 to 176 and pp. 196 and 197.)

Mr. Funke,—with whom Sturm says (Record, pp. 196 and 197) he had all of his negotiations,—in his examination of 1881, testified that the bill of September 18, and letter of that date, and the prior verbal agreements bound Sturm to the safe return of the goods; that Sturm was responsible for them in case they were lost. (Record, p. 973 and 974.)

Sturm in his examination of August, 1882, was asked by his counsel to give from a memorandum, which he claims to have made at the time, a conversation had between him and his attorney, Mr. Parsons, on March 20, 1868. The memorandum is set out on page 298 of the record. We

quote from it the following: "Had a lengthly interview with Mr. Parsons, who desired to know the terms on which I hold the consigned goods from H. B. & Co. I showed him the bill of October 24, 1867, and letters of consignment of September 18, and October 24, 1867. These constitute all the contracts existing between Bokers and myself." * * * * He says he asked Parsons as to his legal liability for the lost goods, and told Parsons he (Sturm), did not think he was liable and that Parsons said he thought "I am all right in my construction of the contract, but says he wishes that it were a little more definite, and advises that I take the first opportunity to have a better and more particular understanding with Bokers or Funke. He wants the bill of September 18, 1867, which Johnson & Higgins have not delivered or returned to the office." Johnson & Higgins as Sturm's brokers, effected the insurance.

Sturm in all of the insurance cases used the bill of September 18, 1867, in just the form hereinbefore set out, including the "Gold" clause and testified that the prices chargeable to him in the bill were in gold at forty-five per cent. premium and that he was liable, upon the loss of the vessel, for the value of the lost goods, at those prices. (Record, pp. 436, 437, 438, 439, 440 and 441.)

We quote from page 440:

"Cross-question 395. In how many cases and upon what trials of the insurance cases in New York, in which you were plaintiff, or in which Hermann Boker & Co. were plaintiffs, against the insurance companies for loss upon the Keese, was the invoice of September 18, 1867, containing the words 'payable in gold' used?

"Answer. The invoice printed in the Orient case, which was the one Mr. Funke and I agreed upon on March 27, was the one used on all the trials, and at every trial from the trial of the Atlantic case in 1870, until the New York (Mutual) trial in 1876."

In answer to questions 397 and 398 he says he did not at any of the trials suggest that the bill then used was not

correct, in that it stated that it was payable in gold, or that the original did not bear the words "payable in gold."

"X.-Q. 399. Did you at any time suggest to Mr. Funke, or any member of the firm of Hermann Boker & Co., that the invoice transmitted by the letter of September 18, 1867, did not contain the words 'payable in gold'?

"A. Most assuredly I did.

"X. Q. 400. When did you ever make that suggestion?

"A. On March 21st, 1868, I did that most positively."

On page 451, Sturm, on cross-examination, sets out a copy of a statement which was presented to the insurance companies, as showing the cost to him of the Keese cargo. In it, all of the Boker goods are given at the invoice value *in gold* and are carried out in currency at a premium of forty-five per cent. On page 453, he says that this statement was made by his clerk, by and under direction of himself and his counsel. On May 14, 1868, he made affidavit that this statement was made up under his direction, that it was true and correct in all of its details, and that the goods mentioned were purchased by him from the persons, in the manner, and at the prices mentioned therein. The affidavit is set out on page 453 of the record.

Mr. Schumacher in 1884 testified that the original bill introduced in evidence in the present case is in Mr. Funke's handwriting and is the same one he (Schumacher) enclosed in the letter of September 18, 1867, to Sturm, and that it then had printed upon it the "gold" clause. (Record, pp. 2822–2823.)

Sturm admits that he told Funke before the contract of 1867 was made, what he expected to realize in Mexico in gold for the goods. (Record, p. 284, q. 60.)

Funke, referring to the same conversation, says Sturm told him he had sold no "Springfields for less than $12.50 gold," and that Sturm showed him letters—orders for Springfield rifles; that he said he had "orders to Mexico and showed me letters authorizing them for cartridges and

ready-made ammunition for $40.00 per thousand, which we could buy here at $20.00 a thousand." (Record, p. 2194, qq. 141, 142.)

By reference to the invoice it will be seen that the Springfields were charged at $8.00 and $10.00 in gold, thus allowing a profit of $4.50 and $2.50 on each gun. The cartridges were charged at $12.00 and $20.50 in gold, thus allowing a profit of almost 100 per cent.

Sturm testified that he authorized his agent in Mexico to sell the Enfield and Springfield cartridges, which reached there, at $22.00 in Mexican silver, worth 40 per cent. premium over our currency at that time. These were the cartridges charged to him at $12.00, gold. (Record, p. 522.) And he said that he sold the Springfields charged at $10.00 for $12.00 in Mexican silver. (Record, p. 526.)

He testified in the New York Mutual case that the 200,000 Maynard cartridges on the Keese were the subject of a prior agreement between him and Mr. Romero, Mexican Minister at Washington, and that 130,000 of them were for that government, and 50,000 of the remainder "I sold to Colonel Mexia to be delivered to General Pavon. He had agreed to give $40.00 per thousand in gold for them." (Record, p. 502. More to the same effect on p. 503.)

Mr. Funke did not, therefore, as is contended by the District Judge, give Sturm authority to sell the consigned goods at such price as Sturm saw fit, even below the invoice price. He, in terms, limited him, as to the guns, to the invoice price; the ammunition was to be sold "to the best advantage" and Sturm showed orders for it at prices much over the invoice value as above stated. Under those letters, if the circumstances had so changed that the invoice price could not be had, Sturm would have been in duty bound to take new instructions or return the goods.

On the trial of his case against Williams (U. S. Lloyds), Sturm was asked whether his invoice from Boker & Co.

of September 18, 1867, $39,857.60, was gold or currency, and he answered "gold." (Record, p. 454, x.-q. 477.) And in answer to question 487, he said gold was then at a premium of forty-five per cent. In the same trial, he was asked what the Boker goods cost him, and he answered "39,000 and some hundred dollars in gold." (Record, p, 454; see also his answers to the same effect on p. 455.)

Sturm admits that he heard Funke testify in the Lloyds case that the $39,000 of the September consignment was gold. (P. 455.) He says he heard Funke testify to that fact in several of the cases, including the one against the Orient, and that, in that case, when asked what gold was worth at that time, he said: "We arranged it at the rate of forty-five currency." (P. 456, qq. 488, 489.) He says he heard Funke testify at the same time that the invoice then introduced in evidence, being that found in this present record, was the same invoice which was enclosed to Sturm in the letter of September 18, 1867. (Pp. 456, 457.)

In the Lloyds case the following questions were put to Sturm by the Court, and he answered as follows:

Question. "The bill of $39,000 was not paid for?

Answer. "No, sir.

Q. "Was that currency?

A. "That was gold." (Record, p. 488.)

Sturm now wishes this Court to understand that when he thus testified in the insurance cases that the September invoice was payable in gold he did not believe that that invoice at the time he received it contained the words, "payable in gold," but that he and Funke had made an agreement nevertheless that they would swear that the invoice was gold and not currency. This is shown by Sturm's testimony (p. 438), where, when asked if he did not testify in his preliminary examination in the present case that the copy of this invoice which he then presented, having the gold clause in it, was a correct copy of the bill

sent him by Boker & Co., in September, 1867, he answered, "that is my answer, and when I gave that answer I had reference to its being a correct copy—assuming that to be a correct copy *as Mr. Funke and I had agreed upon.*" In answer to question 390 (p. 439), he said that he did not until his return from Mexico know that the bill stated that it was "payable in gold," when Funke called his attention to the fact. "I disputed the point with him at the time, but waived my rights, because he stated to me that it was not worth while for me or him to quarrel about the matter at that time; that the bill stated "payable in gold," and that he had meant gold, but as the goods were lost, they would only hold me for the forty thousand dollars in policies, as stated."

On page 503, Sturm's attention was called to his testimony in the New York Mutual case, tried in 1876, where he testified as follows, referring to the September consignment from Funke:

Question. "Did you buy them from him; or were they consigned to you under these two letters?

Answer. "They were consigned to me. I could do with them just as I liked; either pay the money or return them.

Q. "Did you pay Funke anything for them?

A. "I did not."

Asked whether he so answered, he said:

A. "The questions were asked me, and I answered them in that way, and the answers were true. Mr. Funke and I *made a bargain* about them just as I stated there."

On page 504, question 740, his attention was called to his answers to questions in the Lloyds case as to whether the Boker goods were invoiced in gold currency.

Asked whether he so answered, he said:

Answer. "Yes sir. I recollect it very distinctly, and it is the only time where this matter in regard to the true interpretation of the bill of Mr. Funke *came very near leaking out*, and I stated the facts just as I understood the bill originally, and I recollect perfectly that Mr. Funke was terribly excited over it after we got through."

STURM UNDERSTOOD THAT HE WAS PERSONALLY LIABLE FOR THE GOODS IF LOST.

He insured the goods in his own name, paid the insurance premiums with his own notes before the letter of September 18, 1867, or its enclosed invoice were written. That letter does not say who was to insure, but states that Sturm is to bear all expenses. The letter did say, however, "As you have insured these goods, as well as other merchandise, we should be pleased to have the amount of $40,000 transferred to us." The letter of October 24th said, "Please attend to the insurance of this lot and have the amount transferred to us in one policy."

These demands, though politely phrased, imply authority in the writer to require the transfer. Complainant contends that it was a mere matter of convenience that he took all the insurance on the Keese cargo in his own name. If this were true, how came it that on October 24, just as Sturm was hurried with his arrangements for his departure on the next day for Mexico that the defendants wrote him to "attend to the insurance of this lot" of goods, meaning those on the Wilmington, and have the amount "transferred to us in one policy." If, as Sturm claims, the defendants were taking the risk of the loss of the goods and were themselves insuring against that risk, why should they go through the meaningless form of having Sturm transfer to them their own insurance? If Sturm was not the insurer, the defendants would, of course, have preferred a policy from the company to them direct, to one "transferred."

There is not a line of written evidence in the case, that is above suspicion, indicating that Sturm was not insuring to protect his own liability to the defendants for the safe carriage of the goods, and there is much such evidence, that has not been questioned, tending to show that the contrary is true.

Sturm voluntarily produced, and had identified in the examination of his witness, Colonel Wood, certain letters from Sturm's counsel, John E. Parsons, to Sturm. One of these letters is set out in the cross-examination of Sturm and is dated New York, May 29, 1871. (Record, p. 589.) In that letter Parsons, among other things, says: "Your letter was duly received. Before acting in the matter, I sent to Mr. Schumacher, whom I thought it best to see. * * * * * I did not like to ask the direct question, but I did give him the opportunity to tell me whether they held the policies absolutely, or merely as collateral on your account. He gave me no answer. Before I proceed further, I think it prudent to suggest to you that, if you have not done so already, you have a distinct understanding with H. B. & Co. I am well aware that this is none of my business, and I have no wish to pry into your transactions with them. I REMEMBER, HOWEVER, THAT YOU DID, AT ONE TIME, TELL ME THAT THEY HAD THE LEGAL RIGHT TO TREAT YOU AS OWING THEM THE FULL PRICE OF THE CONSIGNED GOODS, AND I DID NOT THINK IT JUDICIOUS TO ARRANGE ANY SETTLEMENT TILL I HEARD FROM YOU, THE EFFECT OF WHICH MIGHT BE TO MAKE YOU PAY H. B. & Co., 100 CENTS ON THE DOLLAR, AND GET ONLY 50 CENTS YOURSELF. I SHALL AWAIT YOUR ANSWER BEFORE I PROCEED." * * * * *

Sturm was asked in question 1428 (Record, p. 589), to produce a copy of his letter to Parsons in reply to the one just mentioned and stated that he was then traveling too much to admit of his taking press copies. The evidence shows that he was at his home in Indianapolis for some time before and after this date. On May 22, 1871, he wrote Schumacher from Indianapolis (Record, p. 2854), where the letter is set out. In that letter he spoke of the proposed settlement of his Great Western case, and says that he wrote Parsons on the subject "day before yesterday." Evidently Parsons' letter of the 29th answered this letter of Sturm written at Indianapolis on the 20th of May.

On June 3, 1871, Parsons wrote Sturm (p. 590), as follows: "I have your favor of June 1, and hasten to reply. I have been apprehensive that H. B. & Co. intend to take this position in the end—that as the consigned goods were not returned, you are liable to them at the invoice rate and interest; that they will charge you with that amount and all the expenses; credit what they shall collect, and hold you for the deficiency. Now is the time to have it understood that they shall take what they can collect and make no claim upon you. * * * * * I advise you not to fail now to have a distinct understanding."

We have not Sturm's letter of June 1, to Parsons, but had it been produced it would certainly have shown that one of the things he did not say was that he was not personally liable to the defendants and that he had a distinct understanding with them that he was not to be held liable. Whatever Sturm wrote in that letter only made Parsons the more anxious that Sturm should at once procure a release from the defendants from personal liability before Parsons settled Sturm's pending Great Western case.

In the trial of the Great Western case, Sturm's complaint therein was placed in his hands and he was asked whether he knew that it contained this clause, "that at the time the said policy was so affected, and all the time down to the said loss, the plaintiff was the owner of said cargo?" and he answered, "Yes, sir."

Question. "Was that true?

Answer. "Yes, sir.

Q. "Was it true in respect to the goods consigned to you by H. B. & Co.?

A. "Yes, sir."

Asked in the present case whether he so answered in the Great Western case, he answered:

A. "Those questions were put to me and I answered them in that way, and at the time, by advice of counsel, I was correct." (P. 471, q. 556).

In the same case he was questioned and made answer as follows, referring to the Boker goods:

Q. "When did you become the owner of them?

A. "I had the whole responsibility.

Q. "When did you become the owner of the goods?

A. "The moment they were delivered on board the Keese."

Asked whether he so answered, he said:

A. "Yes, sir, that is correct; under the circumstances, that was a correct answer. They were in my trust and care—*I had to return them or account for them in some way.*" (P. 471, q. 557).

In the same case he was questioned and made answer as follows:

Q. "What do you mean by being the owner for the time being?

A. "They were delivered to me by H. B. & Co. under that agreement, and I was responsible for those goods until they were returned or until I had delivered the money to them. That is what I mean." (P. 471, q. 558.)

Sturm in 1876, in the trial of the case of Funke *v.* The New York Mutual, referring to the Boker goods, was questioned and made answer as follows:

Q. "Was this entire cargo your property?

A. "I was responsible for the whole of it—in the event of loss I had to pay for it.

Q. "That is not an answer to my question.

A. "At the time I signed that paper— (paper referred to was his complaint against the Lloyds).

Q. "Was it true, as you swore in those pleadings, that these goods were all your property?

A. "Yes, I believed that the whole of that property was mine at that time.

Q. "Were the Boker goods yours which were consigned to you?

A. "That is true; the terms on which I was the owner were expressed in the papers I furnished.

Q. "Do you understand that that made them your property?—Did you understand that these letters made these consigned goods your property?

A. "I understood so at the time, certainly, and I believe so yet." (Pp. 501-552, q. 735 1-2).

On page 505 of the record Sturm was asked whether in any of the New York trials he ever testified that it was understood between him and Funke that Sturm was to take no chance and run no risks with respect to the consigned goods, and he had the effrontery, after his testimony above had been shown him, to answer, his counsel objecting, as follows:

The Witness: "I will answer the question. I will say that I do not remember of that subject ever having been treated upon or that I ever testified in regard to that matter." (P. 505).

AFFIDAVIT OF STURM AND FUNKE, OF JULY 14, 1868.

In the beginning of the insurance litigation, Funke made an affidavit for presentation to the companies, setting out in detail the contract relations between his firm and Sturm, and Sturm endorsed upon it his supporting affidavit. These affidavits are found in the record, pp. 458, 459, 460. Among other things Funke's affidavit states the following:

"That the terms of the agreement of consignment of the aforesaid military goods and merchandise to said Sturm were as follows, viz: That the same shall be consigned to said Sturm for sale in Mexico free of all and any shipping expenses by this deponent's said firm; that the same were to be sold by Sturm in Mexico at the best possible advantage, but not below the invoice price, except if specially directed so to do by this deponent's said firm, in which case the loss was to be borne by them, and the profits arising from the sale, if any, were to be equally divided between this deponents said firm and the said Sturm.

"And also, that in case the same were not sold, the said Sturm was to return the same to this deponent's said firm in New York, free of all charges to them, or pay for the same the invoice price thereof.

(Here follows a schedule of the consigned goods.) * * *

"That the said Sturm effected insurance on the entire of the cargo shipped on board the said schooner, Samuel T. Keese (and of which said cargo the said military goods

and merchandise above particularly described were part), and that subsequent thereto, and at the special instance and request of this dependent's said firm, he, the said Sturm, transferred and delivered to deponent's said firm, as collateral security for said consignment, the policies taken out by him on the entire of said cargo in the following companies, viz :" (Then followed a list of the assigned policies.)

Sturm, in his affidavit, said that he had read the foregoing affidavit of Funke, and that its statements were true.

When Sturm was compelled to produce this affidavit he tried to parry its effect by volunteering the statement following: "I did not read the whole affidavit, as will be seen by my testimony in the Atlantic case ; I believe I only read part of it. I recollect that Mr. Parsons called my attention to the insufficiency of the affidavit, and I wrote a letter to Mr. Funke about it, and another affidavit was prepared in the Orient case, in which matters were changed according to the request of Mr. Parsons. I was at that time not careful enough in reading all the papers." (P. 461.)

He referred to a printed copy of the record of the Orient case, and it developed that what he meant by the new affidavit in that case, was the complaint itself. The affidavit of July 14 was for general use in all the cases, and no similar affidavit was prepared specially for the Orient case. The complaint in the Orient case, of course, differed from this affidavit, just as a pleading would differ from a paper intended to be used as proof. The whole complaint in the Orient case is set out in the record. (Pp. 461–464.) That complaint alleged, among other things, that under the contract Sturm was to sell the goods "in Mexico at the best possible advantage, but not below their invoice price, unless so directed. * * * * That in case the same were not sold, the said defendant, Sturm, was to return the same to these plaintiffs, at New York,

free of all charges to them, or *to pay to them or pay for the same the invoice price thereof.*" (P. 463.)

Immediately following the setting out of the Orient complaint, Sturm made further voluntary statements as follows: (Record, p. 464.)

The Witness: "Now I will state the facts in the case as I recollect them: On the eve of my departure for Washington, I was notified by Mr. Parsons that he had seen the paper drawn up for Mr. Funke, or in Mr. Funke's case—the Orient case—and he said that the matter ought to be changed, as it was not in accordance with what I had told him, Parsons; that the affidavit of Mr. Funke in the Atlantic case did not set out the facts clearly enough, as they ought to be set out, and the matter ought to be changed. I then addressed a note to Mr. Funke and told him to be careful about that, and they did set out the facts differently afterwards, so as to show that I had an interest in the policies. That was all. I have an impression copy of the letter I wrote to Mr. Funke in my letter-press copy book, and I will read it. This is the letter I wrote to Mr. Funke: "October 5—that means 1868, but it is not here; it was printed on the letter and did not copy."

The witness proceeds, of his own motion, to set out the the letter. (P. 464, 465.) This letter is copied in appellants brief at page 56.

Appellant's counsel, in their brief, speaking of Sturm's dissatisfaction with the affidavit of July 14, say: "Sturm also testified that Mr. Parsons called his attention to the incorrectness of the affidavit of July 14, and Sturm wrote to H. Boker & Co. a letter on the 15th of July, calling their attention to that subject and stating that Parsons was dissatisfied with the affidavit. Sturm has a letter-press copy of this letter, but the defendants deny receiving it."

We do not know where counsel get their authority for either of these statements. The place in the record where

Sturm so testified is not shown. No letter purporting to have been written by Sturm to defendant on that date was copied into the record or referred to, so far as we can ascertain.

The letter of October 5 is, we believe, itself a fabrication. Sturm thrust it into the record, as we have shown, voluntarily upon cross-examination. On page 465, answering cross-questions 509 to 513, he says that he puts the letter in to explain the changes in the Orient complaint; that he does not know that he saw that complaint before it was filed, but was told that the correction had been made in it; he doesn't know that he received any reply to the letter as he went to Washington; says it was written at his office. Beginning with cross-question 514 and ending with cross-question 518, is the complainant's evidence on the subject of the delivery of this letter to Mr. Funke. He says he "supposes" Mr. Stocking took it to him; that it was his habit to send letters by Stocking.

Mr. Funke, in his examination of 1884 (Record, p. 2251), spoke of this letter. He said he never received the letter nor one like it; that he has no knowledge or information concerning the letter; that he never heard of such a communication being received by any other member of his firm; and that he never told Sturm that he had received this letter. (Qq. 731–734.)

Mr. Schumacher, in his examination of 1884 (p. 2880), said: "I never had any knowledge of such letter and believe we never received it." Again, on page 2924, question 829, referring to this letter, he says: "Such a letter was never received. It has never been delivered to us I see by the contents of it."

Mr. Rabing, on pages 3207, 3208, says that he has no knowledge that he has ever seen this letter; has no knowledge of its contents, and that he and the members of the firm have diligently searched for all letters from Sturm, and such a letter as this could not be found.

We submit, that under this denial, the evidence of the complainant was scarcely sufficient to raise an issue that the letter had really been started to Funke, much less delivered to him.

But, in view of concurrent events, such a letter could not have been written at that date. It states that it is occasioned by Mr. Parsons' dissatisfaction with the wording of Funke's affidavit of July 14. If Parsons was not dissatisfied with that affidavit, the letter can hardly be genuine. It was written for the purpose of conveying a message as to the form of a pleading in a case where Parsons was of counsel through Sturm to Funke and through Funke to DaCosta, the other counsel in the case—a novel way, certainly, for two lawyers to confer about their pleadings. If the letter were genuine and had any purpose, it was to secure to Sturm the benefit of having the complaints in the insurance cases show that he was not responsible for the value of the lost goods. The record does not set out in full any of Sturm's complaints, but enough is shown to indicate that they, and his own evidence supporting them, differed more widely from this so-called letter of October 5 than did the affidavit of July 14. In the Great Western case, tried January, 1871, Sturm testified that he knew that his complaint therein stated that at the time the policy was issued and thence down to the loss, he was the owner of the entire cargo, including the Boker goods. (Record, p. 472.) In the same case, he testified that he became the owner of the consigned goods the moment they went on board the Keese; that he had the whole responsibility; that they were delivered to him by Boker & Co., and under the agreement I was "responsible for those goods until they were returned or until I had delivered the money to them." In the New York Mutual case, tried in 1876, he testified: "I was responsible for the whole of it. In the event of loss, I had to pay for it." (Record, p. 501.)

The record contains other sworn statements by Sturm, made after October 5, 1868, equally inconsistent with the statements of this supposed letter of that date. The affidavit of July 14 continued to be used unchanged; Sturm continued to file complaints, and to back them with his own testimony just as though no such letter had been written, and his testimony, he says, was given by the advice of the same counsel who he, in the letter, says disputes the theory of fact stated in the affidavit; the same counsel who wrote the letters of May 29 and June 3, 1871, quoted from at pages 22 and 23 of this brief. We think that enough has been shown to demonstrate that this October, 1868, "letter" did not truthfully represent either the ideas entertained by Sturm or Parsons at the time the letter bears date. But we have in the record a written statement from Parsons, showing that Sturm did not make this affidavit without Parsons' advice, and that Parsons had examined it, and approved it before Sturm signed it. It so happened that Mr. DaCosta had preserved the original draft of this affidavit. It was put in evidence in this case, and upon the back of it in Mr. Parsons' hand writing was the following endorsement:

"I fully approve, if General Sturm does not object to have it appear, that he was to divide profits. (Signed) J. E. P., July 8, 1868." (Record, p. 3032.) Parsons "fully approved" all that the affidavit said as to Sturm's liability to the defendants for the value of the lost goods, but he doubted the propriety of Sturm, a General in the Mexican Army, and purchasing agent of the Mexican Government, showing that he was to "divide profits" upon a sale of arms to that Government. This letter was intended to blot out of the history of these cases the fact that Sturm had been described as the "buyer" and "owner" of the consigned goods; but it was not in Funke's affidavit of July 14, where he was so described. Funke merely showed in that affidavit that Sturm was liable for their invoice price. It was in Sturm's own testimony, and in his own complaints in the insurance cases where these words which now so stand in the way of his present desires were used.

This supposed letter, upon the reading of it, will be found to abound in absurdities when it is considered that it was written upon the advice of a lawyer, and one, too, that this record shows stood high in his profession. We submit that this letter was not written at the time it bears date, and is spurious.

The statement of Sturm that the record in the Atlantic case would show that he did not read the whole of the affidavit of July 14 before signing, proved to be without substance when sifted down. On page 958 of the record, cross-question 3995, he points out in a copy of this affidavit (appended as an exhibit to the Atlantic case record), a stenographer's memorandum interlined in the affidavit just before the words "the actual value of said military goods," which memorandum reads as follows: "The following part of affidavit read by plaintiff."

He doesn't pretend that there was any question asked him in that case, as shown by the record, then in his hand, as to whether he had read only a part of the affidavit. He doesn't claim that the evidence shows how the stenographer came to make this notation. It is a note that anyone accustomed to court records would recognize as meaning that upon the trial of the cause the part of the affidavit indicated was read on the plaintiff's behalf in the hearing of the Court or jury trying the case. His purpose in denying that he had read this affidavit was to show that he did not discover until after July 14 that Funke was claiming that he, Sturm, was liable for the value of the lost goods. It will be seen by question 3985, p. 958, that the part of the affidavit which Sturm admits he read, states that Sturm insured the whole cargo, and afterwards, at Funke's request, transferred and delivered part of the insurance as "*collateral security for the consignment.*"

We think we have shown that the contract was payable in gold, both according to its written terms and according to the meaning of both of the parties. This was the only

part of the written contract that Sturm disputed. He was satisfied to admit that it had always stated on its face that the goods were forwarded at Sturm's risk.

The complainant's counsel in their brief (pp. 11–12) advance this argument as to the phrase in the September invoice "forwarded for your account and risk per——," viz: That it was only in print; was part of a printed bill-head; that the invoice of October 24, for a different lot of goods, going by steamer in which Sturm was a passenger—was all in writing, was not upon a bill-head and did not contain this phrase; that the two invoices not reading alike, the one in writing should prevail and the printed matter in the other be discarded. They say this is "an elementary rule for reasons obvious." We venture to say that such a rule of construction when applied, as here, to two distinct writings is not only not elementary but is quite novel and original. The rule, we take it, as to written and printed matter appearing in the same instrument, is this: that if they are in discord, the matter in print is controlled by that in writing. But here there are not conflicting provisions. One consignment affirmatively stated that it was at Sturm's risk. This consignment embraced all of the lost goods. The other invoice said nothing about risk.

The only other consideration advanced by complainant's counsel is copied from the opinion of the District Judge. He thinks that because the defendants were probably accustomed to use this bill form in shipping goods by designated lines to their customers, at purchaser's risk, that therefore when they used the bill-head with Sturm, who was not an ordinary purchaser, but a consignee, that they did not mean what they said, but they meant rather, "for your account and at our risk." He thinks that the fact that the blank space for the name of the transportation line was left blank, left the whole line meaningless. We submit this is not sound reasoning. The sense as to the

risk is complete. The bill states that the goods go "at your risk." These goods were not to go by any ocean freight line. Sturm had chartered the two vessels and proposed to fill them entirely with his own freight, either bought or consigned (pp. 3–26–28.) In other words the consignee, the person addressed in the remark, "at your risk," had undertaken to receive this property in his own private vessels, and to himself carry it to its destination at his risk.

We have then this state of facts: The parties, after preliminary negotiations, entered into a contract, in writing, of September 18, 1867, under which the complainant became possessed of valuable personal property of the defendants' to be shipped by complainant in his own vessel; and he acquired certain valuable privileges as to the disposition of the property by sale. This contract in terms provides that the goods are carried by complainant and at his risk, and if not sold are to be returned by him to defendants without any expense to the defendants. The goods are lost at sea. The complainant then seeks to recover by suit insurance on the lost cargo, and in that litigation he time and again testifies that the contract under which he had these goods in possession was in writing and embraced in letters and their accompanying invoice; that under these he was, as he always understood and still understands, liable for the safe return of the goods if not sold, and that in the "event of loss I had to pay for them." These defendants, in the same litigation, testified to the same thing. Upon this theory of fact and of law, the complainant recovered the insurance. The District Judge held that the parties meant nothing by the words in the contract, "at your risk;" that these words were there, not by design, but by accident. If that be so, where did Sturm find in "these papers which I have produced to the insurance companies" the agreement that he says is there that, "in case of loss," he, Sturm, was to "pay for them?" He found it, of course,

in that part of the contract which stated that the goods were forwarded at Sturm's risk and if not sold were to be returned free of expense.

Courts are loth to expunge parts of written contracts even while they remain executory; but after performance, and where both parties have, as here, deliberately made oath that certain matter therein, now sought by one to be expunged, was expressive of their real intent at the time of contracting, courts should, as they do, shut the door upon the unconscionable suitor.

To ask that this Court shall now reconstruct this contract by elimination, comes too late after the parties have enforced it as against third parties, and have performed it as between themselves, precisely as it is written.

Fred Sturm's Letter.

We may now examine in what manner the complainant, in his brief, attempts to overcome the written statement in the contract that if the goods were not sold they were to be returned by him without expense to the defendants, and the statement that they were forwarded at Sturm's risk, and all of Sturm's and Funke's evidence in the insurance cases, to the effect that Sturm was liable for the invoice price of the lost goods. They submit a letter, which they say Fred Sturm, complainant's brother, wrote to the complainant while the complainant was still in Mexico, on the subject of Sturm's relation to the lost goods. This letter is copied from in complainant's brief at pages 12 to 15—it is set out in Sturm's examination-in-chief of 1882. (Record, p. 274). The District Judge lays much stress on this letter; in his opinion, he quotes proposition 2 of this letter and prefaces it with this remark: "It," referring to the letter, "says they claim 'that the arms now which were on the Keese were sold each and all to the insurance companies,'" etc. (Record, pp. 106, 107). The letter nowhere says that the

defendants, or any one of them, or any agent of the defendant have, to the writer of this letter, "claimed" anything. This is what the letter states (Record, p. 276):

"To-day now we, Corlies, Tifft, Stocking and I have held great council: What is best to guard your interests? as Stocking just tells us that Bokers, during the last few days have acted very queer, and made remarks during conversation as if they had only given you the arms as agent on commission, and therefore, as before, said they had not charged them against you in their books, etc. I will now write you in detail *what Bokers have told Stocking:*

"1. They contend that you have no further interest in the arms you received from them than one-half of the profit. * * * * *

"2. That the arms now which were on the Keese were sold each and all to the insurance companies."

The letter is at best, therefore, hearsay at third hand. It is what Fred Sturm tells complainant that Stocking says Bokers have said to Stocking. There is no evidence that this letter was shown to any of the defendants. It was not competent evidence against the defendants. The letter was set out in the evidence in complainant's examination-in-chief, but the defendants, at the end of that examination (Record, p. 395), reserved to themselves "the right to object to the incompetency, irrelevancy or immateriality of any of the testimony taken." The letter was also referred to and commented upon by complainant's witness, F. C. Sturm, complainant's brother, who claims to have written this letter. (Record, p. 1225, *et seq.*)

At the conclusion of that deposition (record, p. 1245), the defendants reserved to themselves the right "to object on account of incompetency, irrelevancy or immateriality of any testimony taken."

Fred Sturm, in his deposition, admits that he never met any of the defendants except Mr. Funke, and that he met him but three times, each time in the presence of Wilbur F. Stocking, who participated in whatever conversation passed between Fred Sturm and Funke. In this letter of

November 28, 1867, he says that the first talk with Funke was on the 3d day of November, 1867, the day Funke showed him a telegram from complainant, saying that the Keese had been lost, and that he, Sturm, had written. He says Funke wanted him to do something about retaining the sailors as witnesses; that he replied that he was without authority, and would await Sturm's promised letter. (Record, p. 1241.) He says that the next conversation was after Sturm's letter of November 1 to the witness, Fred Sturm, was received, which was received, as he says, in another place, refreshed, as he says, by his letter of November 28, on November 8; that Funke, in this conversation, asked him to look after his brother's interests in the lost goods, etc., but that he refused, as his brother had in the letter of November 1 instructed him to take no steps. A reference to his account of this conversation, as detailed on page 1242 of the record, will show that Fred Sturm did not claim that Funke had told him what was detailed by Fred Sturm in his supposed letter of November 28. He says that the third conversation amounted to nothing; that in it he simply greeted Mr. Funke, and, after handing Mr. Stocking the letter of September 18, and invoices, bid them "good-bye." (Record, p. 1243.) Fred Sturm, in this deposition, says that Mr. Funke suggested to him, before this letter was written, that he should write to his brother. (Record, p. 1236.)

Mr. Funke, in his deposition of 1884, was shown this letter and stated that he did not suggest the writing of it; that he had never seen it and had never heard of it. (Record, p. 2287.) In the deposition of Fred Sturm the complainant caused to be set out his alleged letter of January 7, 1868, to Fred in reply to the letter of November 28. (Record, p. 1244.) Complainant attempted to prove by Fred that Funke read this letter of January 7, but the witness answered that he did not know whether he did or not. (P. 1245.)

Mr. Funke testified that he had no knowledge of this letter of General Sturm's. (Record, p. 2287.) Mr. Funke further testified that he had no acquaintance with Fred Sturm, except that the complainant had casually introduced them at the corner of Broadway and Dey streets, New York, while the Keese was loading. He says that he never saw the letter of complainant to his brother Fred, dated Havana, November 1, 1867, and that he never had any conversations with Fred Sturm after the Keese was lost. (Record, pp. 2286–2287.)

When this letter of November 8, 1867, was introduced and set out by copy the complainant, the witness, purported to read all of it, including a postscript. (Record, p. 278.) He did not speak of any of it being in the handwriting of any person other than his brother Fred. Appellant's counsel in their brief show a consciousness of weakness about the genuineness of this letter. They say, on page 15, that at the conclusion of this letter there is in the handwriting of Wilbur F. Stocking the words "Let me know when you will probably return. Truly yours, Wilbur F. Stocking." They also say "Tifft testified that this was the handwriting of Stocking (record, 1479, Q. 53) and other witnesses."

We do not know what other witnesses they refer to. If the "other witnesses" were as indefinite about this matter as was Tifft, it could hardly be said that any one testified that this was Stocking's writing. It will be noticed that Fred Sturm did not say anything on the subject. We quote Tifft's testimony referred to by complainant:

Question 53. "I now show you the original of the letter about which we have just been talking, and direct you to the following words at the foot of the 8th page of letter, to-wit: 'Let me know when you will probably return. Yours truly, Wilbur F. Stocking,' and ask you to state, if you know, in whose hand writing this language is?

Answer. "To the best of my belief, I should say they were in the hand writing of Wilbur F. Stocking."

On what he founded that belief is not shown.

It is strange that Stocking should have thought it worth while to ask such a question in view of this statement in Sturm's letter of November 1, then being answered by Fred: "Bokers will know what is best to do, and I shall return before very long, probably by January 10, and no harm will be done by waiting that long." (Record, p. 1226.)

The defendants, of course, do not know how or when this letter was written. It is enough that it was not written to them, nor by them, nor to their knowledge. It disputes the sworn testimony of Sturm and Funke in the insurance trials and the affidavit of Sturm and Funke of July 14, 1868, and it disputes the plain written provisions of the contract of consignment. It would have no weight as evidence against the defendants if it purported to recount Funke's statements to the writer, Fred Sturm. As it is, its statements are hearsay at third hand, and unsworn to.

The District Judge, in his opinion, while commenting upon this letter and the other correspondence supposed to have passed while Sturm was in Mexico, referring to the telegram of Sturm, of November 1, 1867, announcing the loss of the Keese, and to the defendants' evidence in relation thereto, says (p. 111): "They deny that they received a telegram from General Sturm, in Mexico." He refers to the telegram from Havana, telling of the loss of the Keese. The evidence does not warrant the statement. Mr. Schumacher testified that he thought this telegram came to Wilbur F. Stocking and that it was shown to defendants by Stocking. This business was in the hands of Mr. Funke. He knew more about it than any of the defendants. In his examination of 1884 (record, p. 2197), he was asked when his firm learned of the loss of the Keese. He answered (q. 170): "I am not sure whether we got a dispatch first or not. Stocking

came to me and wanted to know what to do. I may have sent him a dispatch before I saw him, but I am not sure whether the dispatch was sent to him or to me first. There was a dispatch, I know." Funke, in his examination of 1881, said that they received the news of the loss of the Keese on November 1, by telegram from Sturm; that he thought it came to Wilbur F. Stocking, but that it might have come to his firm; that he has not seen it since that time, but that they may have it and he will look for it. He asks complainant's counsel: "Are you sure that it came to us?" and Judge Claypool replied, "I can't say; I think you will find it so."

Qustion 184. "I will ask you now if you don't recollect that you got a dispatch from General Sturm, direct, and that after getting it you went to what was then General Sturm's office and found Wilbur F. Stocking?

Answer. "That may be. I don't recollect about that; whether he came to me or whether I went to him. If he got the telegram, he came to us, and if I had it, I went with it to him." (Record, p. 980.)

From what we have quoted it will be seen that a fair construction of the testimony of the defendants themselves does not justify the statement of the District Judge that they denied the receipt of this telegram. They, in fact, admitted its receipt. They were not sure whether it came direct to them, or through Stocking.

The District Judge in the same connection says that the defendants deny that they received "the letter which Sturm sent them in a package of letters, one to Governor Morton and one to somebody else, *sent by messenger.*" Sturm did not claim that he sent any letter to defendants by messenger. This remark refers to a supposed letter by Sturm dated City of Mexico, January 7, 1868. (Sturm in chief, p. 278 and p. 613.) Partridge, one of complainant's witnesses, testified that he was with Sturm on the trip to Mexico, and kept an account of expenses and identified one of Sturm's books as being the account he referred to. He testified that an entry therein, "January 7, 1868, postage,

three letters, $1.50," was the entry which applied to a package of letters sent on that day by Sturm in one general envelope addressed to Hermann Boker & Co.; that each letter was enclosed in its own particular envelope addressed to the person it was intended for, and all were put into the general envelope addressed to the defendants. There is nothing in the memorandum showing to whom the letters were addressed, but he claims to be able to say by a sheer act of memory that one was for Frederick Sturm, one for Senator Morton, and the third for Hermann Boker & Co. (Record, pp. 2061–2062.) It was this witness who mentioned the use of "a messenger" in connection with the sending of letters. His evidence on this subject is found in answer to question No. 77 on page 2062. It shows that the letters were not sent by messenger to the United States, but were sent by courier a short distance on their way to the English steamer at Vera Cruz. It is true that the defendants deny that such a letter was received. The complainant produces no letter from them acknowledging its receipt.

The letter-books of the defendants covering this period were turned over to complainant's counsel in the cross-examination of the defendant Schumacher, and he went through them at will. On page 2952, in cross-question 1182, he asks the witness to turn to a letter of January 16, 1868, by the defendant firm to Holder, Boker & Co., of the city of Mexico, and "make an extract therefrom," which counsel points out. The witness, by Mr. Rabing, answers, "I have a letter-press copy of a letter in German found in letter-book A, No. 7, page 214, and I take the following extract therefrom: "The letters from General Sturm we have had forwarded." In answer to question 1183, the witness says he does not know what letters these were. Counsel in their brief, on page 17, seem to think that this quoted expression from the letter to Holder, Boker & Co., indicates that the defendants themselves received a letter

from Sturm in addition to the letters they had "forwarded." The defendants' letter was written to a relative of the defendant Boker, an intimate business acquaintance of defendant firm, and its omission to mention the receipt of a letter from Sturm to defendants indicates we submit, rather, that no such letter was then received.

The complainant has testified to the sending of other letters, of some of which he has produced letter-press copies, to which we shall refer later, which are clearly spurious. We therefore confidently urge that the defendants are not mistaken when they say they did not receive this letter, and that the extracts from their letter-books, put in evidence by the complainant, corroborate them.

BOOK-KEEPING.

Complainant's counsel, on page 22, assert that Mr. Funke testified in 1881 (record, p. 973, q. 94), that when the goods "were lost, we were to charge them to General Sturm, as if he had bought them." By referring to the testimony there indicated, it will be seen that Mr. Funke was not discussing book-keeping or the mode of keeping the accounts with Sturm. He was explaining that under the contract with Sturm, he was to safely return these goods to the defendants, free of expense, and that when they were lost, and, therefore, could not be returned, the defendants looked to Sturm for the value of the goods under the contract, and had the right to charge him accordingly.

Complainant argues in his brief (p. 22–23), that the defendants at first denied that they had opened an account with Sturm, but that when their books were called for, they were compelled to admit that they had in April, 1868, opened such an account. They refer for proof of this fact to Funke's testimony of 1884, pages 2347–2348. This is not a candid treatment of this evidence. The subject they are discussing is whether or not the defendants had a "merchandise account" with Sturm—an account appropriate

to receive a charge against him for the value of the lost merchandise. Funke, on page 2347, speaking of such an account, says that they opened none at any time with General Sturm upon their books. Complainant's counsel refers him to ledger 5, page 98, and asks whether the defendants did not, in April, 1868, open an account with General Sturm? (X. Q. 1803, p. 2348.) He answered: "No. A cash account, not a merchandise account," and in answer to the next question the witness says that if there had been a merchandise account it would be on that ledger still. The counsel then proceeds to make inquiry about particular items in this cash account, found in ledger 5, at page 98.

It is fully explained in the evidence that the defendants' system of book-keeping did not involve the opening of accounts with consignees of goods sent out upon consignment prior to an account of sales of such goods being received; that until such report of sales was received, the goods were treated as "in stock"; that no account of sales of the consigned goods was ever received from Sturm, or from his agents. That such returns as were made by Sturm or his agents for his military goods sold in Mexico were simply returns of money, and did not indicate from what goods the money was derived, whether goods bought outright by Sturm, or taken under the consignment contract. The evidence further shows that Sturm was duly credited with all moneys so received by the defendants. The evidence further shows that for goods out on consignment, they kept an account in the "stock account" until accounts of sales were received.

We submit, therefore, that the argument that defendants in April, 1868, opened with Sturm a merchandise account, upon which the lost goods should have been charged, is without support in the evidence referred to by complainant's counsel, and that that evidence in its several parts is absolutely consistent with the defendant's claim.

The complainant admits that he knew, as he did know from the entries in his bank pass-book, that the defendants were charging him with the whole amount of every item paid by them for insurance expenses at the times the payments were made. He now claims, however, that he expected at the conclusion of the insurance litigation, to have an accounting with the defendants, in which they would refund to him a proportion of the expenses, whether paid by Sturm direct or by the defendants, and charged to Sturm's account. There is no genuine correspondence in the record in which Sturm states that he is not to bear the insurance expenses, but there is much showing that he directed the defendants to pay out large sums for that purpose, and to charge the same to his bank account. There is no genuine correspondence showing that Sturm expected to receive back from the defendants a proportion of the expenses in the suits. There are at least two letters, however, that are unquestioned, which show that the defendants were at no time to be called upon by Sturm for repayment of any part of these expenses. We refer to Sturm's letter written from Washington, dated Feburary 8, 1869, set out in his cross-examination of 1882 (record, pp. 573, 574), and to the defendant's answer thereto, dated New York, February 10, 1869, set out in the same cross-examination (record, p. 574), and to Sturm's telegram from Washington of February 10, 1869. (Record, p. 575.)

The letter of February 8, 1869, is addressed to the defendants in their firm name. It states that it encloses a letter from the Captain of the Keese, Keeny, and that Sturm has replied to it, saying "it is impossible for me to do anything in the way of money with him at present. I have told him that I could not make an order on you for either the monthly amount or for the loan he asks. I do not know that Keeny's evidence is now indispensable, and as there seems to be no effort to bring the insurance suit to an immediate trial, I, for one, am extremely anxious to know from our counsel whether it is absolutely necessary. Of

course, if we keep him, we must pay enough to keep along on, but I want him to understand that we have been at great expense in the matter already, and there must be an end sometime. * * * * * Please return Keeny's letter to me, after reading it."

If the parties had understood that the defendants were ultimately to bear a portion of the expenses, such as the allowance to Keeny, there was nothing in this letter to call forth the answer it inspired. As the answer, also, was in reply to Sturm's telegram of February 10. We copy that telegram here:

"Pay Keeny one month, he needs it, *and charge me.*" (P. 575.)

The defendents' letter is found on page 574. It states:

"Your favor of 8th inst., enclosing Captain K. letter of 2nd inst. came duly to hand, as well as your telegram of this A. M., authorizing us to pay Mr. K. for your account, 'for one month,' which, we suppose, means $150. We shall do so as soon as he calls on us. With regard to the further subsidies to be paid to the Captain, *we, of course, have nothing to say*, although our opinion is that he, or his evidence, now, might be dispensed with, *if you have to pay for it so dearly.* We just received Mr. Stocking's letter of yesterday. * * * * * Enclosing letter of Captain K., we are, with best regards,

"Yours truly,

"HERMANN BOKER & CO."

Comment can add little. Sturm, in asking their advice as to the continuance of his payments to Keeny to keep him as a witness, had used the expressions "if we keep him, we must pay, etc.," and had said "we have been at great expense in the matter already." Bokers' reply shows that, as they were not paying these expenses, they could not decide for Sturm, but that their advice was that, if it was to cost HIM so dearly, HE had better do without Keeny's evidence. If they had in terms said that the collections from the insurance companies were for Sturm's account and were to be made wholly at

his expense the fact would not more clearly appear that this was the understanding of the parties at the time this correspondence passed. The telegram "PAY KEENY AND CHARGE ME," meant just what it said. The defendants had been paying money for Sturm in the insurance suits and charging him ever since they were begun.

Sturm did not answer defendants' letter of February 10. If he had undersood at that time that the defendants were to look to the insurance companies, and not to him, for the value of the lost goods and were to refund any part of the expenses of the insurance suits, Sturm would not have left this letter unanswered. He would have replied that the payment of further subsides to Keeny, like all other insurance expenses, was a matter of concern to the defendants, as they would eventually have to pay or respond to him for their proportion of such expenses.

Sturm, in his cross-examination (page 575, Q. 1299), testified that he was keeping letter-press copies at that time, but that he could find no copy of a letter in answer to the letter of February 10, and he had no recollection of answering it. At that point his counsel interrupted the cross-examination as follows. (Page 575.)

BY JUDGE CLAYPOOL.

X. Q. 1301. "I will ask you whether, on the date of February 8, 1869, you wrote a letter to either member of the firm of Hermann Boker & Co.; and, if so, I will ask you to produce it and make a copy of it a part of your answer to this question?

A. "I wrote a private letter to Mr. Funke, of which I have the letter-press copy in my copy-book. It is as follows:

"WASHINGTON, Feb. 8, 1869.

"MY DEAR FUNKE—I wrote H. B. & Co. this morning in regard to Keeny, and this evening I have another letter from him, which I enclose herewith, as also press-copy of my reply to him. As it is too late for the mail to-day, Stocking will enclose them in his letter, which he writes you. Keeny wants to borrow two thousand dollars or fifteen hundred dollars instead of his monthly pay, and I

think it may be well for us to do this. What do you think? Can you not ascertain from DaCosta what we had better do? Parsons says we must have his evidence of course, and it is not wise to take his deposition now. I have, of course, to pay the greater portion of all these expenses, and would like to get rid of these monthly payments, as they sum up fearfully in the end, and one payment as a loan strikes me as not so bad. If possible for you, arrange the matter with K., or else make the payment, one hundred and fifty dollars, as I wrote you last Tuesday. If you want me, telegraph or write. I can come over for a day most any time. "Yours in haste,

"H. STURM.

"I produce here the letter-press copy of this letter, which I request the reporter to identify with his initials and the present date."

The letter-press copy having been identified, the witness of his own motion continued thus:

The Witness. "This letter was mailed on the 9th and enclosed by Stocking in his letter to Funke, dated February 9, which was written the evening before, of which I have also a letter-press copy here, and which I also ask the reporter to mark for identification, and will make it a part of this answer."

This having been done, the witness again of his own motion continued as follows:

The Witness. "My recollection is that the 8th was Sunday—I am not sure—and it was pretty late in the evening when I wrote the letter to Mr. Funke. Mr. Stocking had written his letter there. He had written a letter which was to be mailed the next day, and it was dated the next day."

In questions 1302–1303 Sturm's counsel asks him what reply the defendants made to this letter, and he answers that he has no other letter except the one of February 10, already set out, which he says is in Mr. Schumacher's handwriting. Being requested by his counsel so to do, he sets out on page 576 from his letter-book Stocking's letter to Funke, dated February 9, 1869, the original of which the defendants then and there admitted they have.

In Sturm's direct examination of November, 1883,—the year following—he is asked by his counsel as to whether his payments to witnesses, etc., were made with H. B. & Co's. knowledge, and he answers in the affirmative, that the persons were employed by defendants in part, and in part by Sturm with defendants' knowledge, and he sets out a list of the persons, commencing with Captain Keeny, and ending with the reporter of the Supreme Court. (P. 1332. Q. 177).

Question 178. "In this connection I will ask you to look at question 1295 of your cross-examination, in answer to which you produced a letter of yours to H. B. & Co., mentioning the fact that you enclosed to them a letter of Captain Keeny. Have you got that letter? If so, produce it?

Answer. "I have the original letter referred to, and I produced it for identification. To it is attached another letter, which I also produced, dated February 9, which letter I also sent to Mr. Funke."

In the cross-examination of Funke of 1884 (p. 2423), complainant's counsel produced the first Keeny letter, the one dated February 2, and had Mr. Funke examine it. This is the letter that Mr. Schumacher returned to Sturm in the letter of February 10, which he signed with defendants' firm name. Mr. Funke stated on page 2424, that he did not think he had ever seen this letter, that he never heard of it. This is quite probable, as the letter was received by the defendants in Sturm's letter of the 8th, and returned to Sturm in Schumacher's letter of the 10th.

Mr. Funke in his direct examination of 1884, (p. 2256, Qq. 794, 795) stated that he never, to his knowledge, received Sturm's alleged letter address to him from Washington, dated February 8, 1869, and never heard that such a letter was received by any of his firm. Mr. Schumacher, on p. 2944, X. Q. 1077, testified that the defendants have no such letter as the one Sturm claims to have written to

Funke. In answer to questions 1249 to 1252, page 2965, Schumacher being shown Keeny's letter to Sturm, dated February 9, 1869, says it is in Keeny's handwriting he thinks from its signature, but that he, Schumacher, had never seen that letter until shown to him at this examination.

Mr. Rabing, in his examination of 1884, in his list of letters, which Sturm claimed to have written defendants, but which were not received by them, includes this one of Sturm to Funke, of February 8, 1869, and says that he has no knowledge of such a letter, and that he and the members of the firm had made diligent search, and have found none such. (Record, pp. 3207, 3208.)

We submit that there was no evidence of the mailing of this letter to Funke, and the conditions were not present in the evidence for the introduction of the press copy of it in the evidence.

In addition to the defendants' denial of its receipt, the copy produced by Sturm contains conclusive evidence, we think, that it is spurious. Sturm in his genuine letter, written on the morning of the 8th, says he has told Keeny, in answer to Keeny's letter of the 2d, that he could not then pay him his monthly allowance, nor make him the loan asked for. He suggests that Keeny's evidence might be dispensed with, and is anxious to know from our counsel whether it is absolutely necessary. And says that Keeny must understand that there must be an end to these payments some time. This letter, admitted to be genuine, could not have been written on the same day that the alleged letter to Funke was written. We set the two letters out in parallel columns, that they may be compared. They are as follows:

GENUINE LETTER.

"WILLARD'S HOTEL, WASHINGTON, D. C., Feb'y 8th, 1869.

"*Messrs Hermann Boker & Co.:*

"GENTS—Enclosed, please find a letter from Capt. Keeny, to which I have replied saying that it was impossible for me to do anything in the way of money with him at present. I have told him that I could not make an order on you for either the monthly amount or for the loan he asks. I do not know that Keeny's evidence is now indispensable, and as there seems to be no effort to bring the insurance suits 923 to an immediate trial, I, for one, am extremely anxious to know from our counsel whether it is absolutely necessary. Of course, if we keep him, we must pay enough to keep along on, but I want him to understand that we have been at great expense in the matter already, and there must be an end sometime.

"In regard to Cuban affairs, I have to say only that the Commissioner has arrived, but will not receive his papers until the next steamer arrives. I have good hopes of doing something through that connection. Please return Keeny's letter to me, after reading it.

"In haste, yours truly,

"H. STURM."

SPURIOUS LETTER.

"WASHINGTON,
February 8th, 1869.

"MY DEAR FUNKE—I wrote H. B. & Co. this morning in regard to Keeny, and this evening I have another letter from him, which I enclose herewith, as, also, press copy of my reply to him. As it is too late for the mail to-day, Stocking will enclose them in his letter, which he writes you. Keeny wants to borrow two thousand dollars, or fifteen hundred dollars, instead of his monthly pay, and I think it may be well for us to do this. What do you think? Can you not ascertain from DaCosta what we had better do? Parsons says we must have his evidence, of course, and it is not wise to take his deposition now. I have, of course, to pay the greater portion of all these expenses, and would like to get rid of these monthly payments, as they sum up fearfully in the end, and one payment as a loan strikes me as not so bad. If possible for you, arrange the matter with K., or else make the payment, one hundred and fifty dollars, as I wrote you last Tuesday. If you want me, telegraph or write. I can come over for a day most any time.

"Yours, in haste,

"H. STURM."

These two letters Sturm says (p. 576, q. 1301) were written on the same day—Sunday; that the first was written in the morning; the second, to Funke, late in the evening; that Stocking that evening was writing a letter to Funke, which he now remembers he was dating as of Monday the 9th, because it was too late for mailing on Sunday. A most marvelous exhibition of memory!

There are some things about these two letters which he did not remember, or if he did, which he chose not to explain: In the morning letter he was anxious to know "from our counsel" whether it was necessary to keep Keeny and to have his evidence; in the evening—Sunday evening, too—he writes, "Parsons says we must have his evidence, of course." This "Parsons says" is the "trail of the serpent," for it seems to be over many of Sturm's letters that were not received. But how could Parsons have said so to him during that day? Parsons was in New York, Sturm in Washington. In the morning he was

writing defendants to learn from Parsons what he would say on this very subject. He was then anxious to know what "our counsel" think about it. He had no opportunity to learn during Sunday what Parsons would say. In the morning he writes defendants that he has written Keeny that he can neither pay any monthly allowance nor loan him $1,500, and says that he thinks his evidence can be dispensed with and the payments stopped. In the evening he tells Funke that he has "this evening another letter from Keeny," which he encloses; that Keeny wants to borrow $2,000, or $1,500, instead of his monthly pay, and that he, Sturm, thinks the loan had better be made. He asks Funke to arrange the loan with Keeny "or else make the payment, $150, as I wrote you last Tuesday."

Sturm did not produce a letter written on the date referred to as "last Tuesday," which would have been February 3, nor did he call upon the defendants to do so. We presume there was no such letter. He called for a letter dated February 4, but the defendants had received no such letter, and Sturm, although at this time he was preserving letter-press copies, produced no copy of such letter, and offered no evidence whatever that such a letter was written, or of its purport. We therefore assume that there was no letter of February 4. Had he written the defendants on February 3 or 4, as he claims in his alleged letter of Sunday evening, telling them to pay Keeny $150, and had repeated the same thing in a genuine letter of Sunday evening, and then telegraphed as he did, in fact, telegraph on the 10th, "pay Keeny one month—he needs it—and charge me," the defendants would not, in their letter of the 10th, have said they *supposed* he meant one hundred and fifty dollars. Had either the supposed letter of February 4, or this alleged Sunday evening letter been received, the defendants would not have merely "supposed" this, they would have known it, for the copy of the Sunday evening letter set out in the evidence, names that amount.

Another thing that Sturm could not very well explain about this Sunday evening letter, was this: It stated that it enclosed a letter from Keeny, received that evening. Sturm produced and put in evidence this enclosed letter. How he came by it he does not know. Further, this letter, when produced, proved to bear date, "New York, February 9, 1869." How Sturm could have received this letter and enclosed it to Funke on the evening of February 8, he does not attempt to explain. Yet Sturm, in his evidence and in this "letter" of the evening of February 8, from Washington, says that he has received and encloses this second Keeny letter. Sturm's evidence, on page 575, indicates that he had no copy of his telegram to the defendants of the 10th. We submit that all of the objections pointed out to this "letter" of Sunday evening can be satisfied and can only be satisfied in this way, viz: Sturm did not write the supposed letter of Sunday evening; that on the morning of the 10th, not having yet heard from defendants in answer to his letter of Sunday morning, and having on the morning of the 10th received Keeny's second letter, that of the 9th, under the pressure of that letter, he concluded to pay Keeny for another month, and, therefore, at once wired the order to the defendants. Had he preserved a copy of his telegram of the 10th, or remembered that such a telegram had been sent, we think this alleged letter of Sunday evening would not have been manufactured or heard of in the evidence. The genuine letter of the 8th and Bokers' answer of the 10th were so inconsistent with the theory of Sturm's bill in this case, that he fabricated for the purposes of the case a letter which he hoped would counteract the effect of the genuine correspondence.

We submit that the written contract is not susceptible of the construction put upon it by the District Judge, and so faithfully adopted as a sort of after-thought, in the first twenty-five pages of complainant's brief.

The District Judge's position seems to be that under the written contract of consignment—the letters of September and October, 1867, and invoices—Sturm was not liable *in personam* for the value of the goods upon their loss, and, from this, he concludes that "Sturm should recover" in this case. We quote from his opinion, near the bottom of page 105, the following:

"In other words, I am firmly convinced that on the face of this contract, as it is written, General Sturm has a right to recover in this case, no matter what perjury has been committed; no matter what forgery. That is my interpretation of the contracts on their face."

The District Judge does not explain what it is he thinks under his interpretation of the written contract Sturm has a right to recover. He seeks to recover for money expended by him in keeping the witnesses who testified in his cases and also in those of the defendants; also for his own services in looking after the litigation upon the policies held by himself and those held by the defendants, together with fabulous amounts for interest. We think the complainant framed his bill on the theory of a new substantive contract made March 21 and 27, 1868, providing for a joint fight and joint contribution to the expenses of litigation and for a division of collections, because he knew that he could not recover for moneys and services voluntarily paid and given. He knew he could only recover upon a contract with the defendants whereby they *agreed to compensate and repay him.* Therefore the bill grounds complainant's right of recovery, not upon the written contract, but upon the alleged subsequent contract for a "joint fight."

NEW CONTRACT.

The bill alleges that the contract as to a joint fight and joint contribution to expenses and as to compensation to Sturm for his personal attention to the litigation was made first on March 21, 1868, and, for the sake of greater certainty, enlarged by a further agreement to the same effect

on March 27, 1868. Sturm swears that on March 21, he talked the matter over with Funke, on Broadway, as they walked from Sturm's office, No. 57 Broadway, to a restaurant kept by Frank Mann; that he and Funke were alone in their walk; that Wilbur F. Stocking was present and heard the conversation at the restaurant, where Sturm, in the hearing of Stocking and Funke, repeated the terms of the verbal agreement then entered into. (Record, p. 283.) He says that he and Stocking went from this interview direct to the "Stevens House" where Sturm made a memorandum which he read to Stocking and that Stocking also made a memorandum. Stocking had died before this litigation began. Sturm was the only witness supporting the bill respecting the contract then and there in the bill alleged to have been made.

STURM'S MEMORANDUM of this interview is found set out in the evidence at pages 186-187. It is headed at the "Stevens House, New York, Saturday, March 21, 1868." The first part of the memorandum in substance, states that Funke "insists that the bill of goods on the Keese was gold and the others were not, and wants the statement which is to be made, to be so made that it corresponds." "After some plain talk, I agreed to this view, with the distinct understanding that I have no further responsibility than the $40,000 policies called for in their letter of September 18, 1867, which says nothing about gold." Following the foregoing for quite a space, the memorandum purports to give the views of the two, Stockings and of Sturm, as to how the bill came to state that it was payable "in gold." The memorandum then continues thus: "Mr. Funke came into the office a while ago, and I am satisfied he does not intend to take advantage of the blunder or accident, as the contract covers the ground." The memorandum then for quite a space purports to give the views of Tifft and some lawyer named Jerome, whom Stocking had employed, as to Sturm's liability for the lost goods. It then continues thus: "4:00 P. M., saw again Funke on Broadway and, on

going up street to Mann's, he reiterated that he did not intend to hold me to the difference between gold and currency, when we talked this morning; that the difference would not affect me in any way. * * * * * We understand each other then, viz.: That these goods of September 18 are considered sold to the insurance companies for $40,000.00 policies on the Keese and $15,000.00 on the Blonde, the policies which you hold, and that I have no further claim against them and you none on me, and you fight for your policies and I fight for mine, except the surplus which you hold, which you had better sue for, as you say, in your own name. That is what I said to him, to which Funke replies that is all right, and accords with his views. W. F. S. came in while we were still sitting at our table, and I explained to him the whole thing. We went away soon after, as Funke had to get the boat, and Will and I went to the Stevens House and go over the whole thing again."

On page 184, in answer to question 112, Sturm testified that this conversation must have been had "in the neighborhood of the 23d or 24th of March, 1868, because on the 22d day of March, Mr. Funke and I had agreed upon the manner of conducting the suits, and this dispute about the bill was before them; so I know about that." On the same page he stated that he thought the conversation occurred at his office, No. 57 Broadway. On the next day (p. 186, q. 128) he voluntarily corrected this, and stated that by examining the papers he found that the conversation occurred on March 21, and that the memorandum of it was written out at the Stevens House.

On page 441, X. Q. 399 and 400, Sturm says that in this interview of March 21, he told Funke that the original bill which Funke sent him did not bear the words "payable in gold." In the same cross-examination (of the year 1882, Record, p. 442, X. Q. 401) he says that on March 21, he and Funke were at No. 57 Broad-

way, "and we were at Frank Mann's during lunch time, and Mr. Stocking was present towards the end of that conversation;" that Funke said that the bill had been shown, and we could not change our contract, or it would not be wise to do so; that I had nothing further to do with it, they would take the policies and consider the goods sold. "Thereupon I agreed with him that I would accept his version of the matter, and that $40,000 of policies on the Keese, and $15,000 on the Blonde, which, according to his theory, were his, were to be considered as his, and the other $15,000 was mine, but that the $15,000 of mine was to be prosecuted in his name, as they had been transferred to him, and that the whole fight should be a joint fight, and we were to share alike. Mr. Funke then made these remarks to me. He says: "Sturm we are merchants here and we will get our money. We will stand by you. We will make a joint fight in this thing and share alike according to the receipts, *and the 45 per cent. gold, if there are any expenses, will be just that much to cover expenses—just that much.* These were his remarks to me." He says in answer to question 404 (p. 443), that this conversation so far as it was had at 57 Broadway, was before lunch time, and that Funke's lunch time was from 1:00 to 2:00, and that the remainder of the conservation was had at lunch. On page 444 he says that Funke came to him, to his office, 57 Broadway, that they talked awhile there, and that Funke then took him to lunch at Mann's, a mile distant, that they did not separate, that they walked and talked as they went.

On page 445, in answer to question 418, he says he made it a point to have Stocking hear the conversation after he joined them at Mann's. In answer to question 419, he says: "Mr. Stocking came in, and I then said to Mr. Funke that he and I had discussed the matter, and everything was agreeable; that *the goods were sold for gold;* that that bill was all right;

and that I considered the bill all right; *that I had accepted it that way;* that there must be some misunderstanding there, but that whatever it was it did not amount to anything now; that Mr. Funke and I *had an understanding that the goods were sold to the insurance companies,* and I had no further responsibility, and that we would make a joint fight, and I went on in detail to him what Funke and I had talked over before, *leaving out our private conversation, which did not concern him,* and also I explained to him that my interest in the policies which Hermann Boker & Co. held was one policy of $15,000. My recollection is that I chose the Mercantile, and Mr. Funke, for some reason or other, said he preferred the Mercantile for himself, and, as it did not make any difference—it was all a joint fight and the policies would not make any difference—I did not insist, but at this time I mentioned the Mercantile. I recollect that." (Record, p. 445.)

Cross-question, 420. "Now, you spoke of some conversation that you went over there on that occasion—what was that?

Answer. "I was just telling you of the private conversation I had with Mr. Funke at No. 57 Broadway, and up at Franz Mann's. Of course Mr. Funk made some statements to me which I never mentioned to Mr. Stocking, which did not concern him—it was private. I talked very earnestly to Mr. Funke and he talked very earnestly to me. I recollect what I said about that gold business. I recollect that. That is the plain English of it."

In answer to question 421 (p. 445–446), he recounts what passed between him and Funke as to the bill being payable in gold, which, he says, was the private conversation. In answer to question 422, he says that he told Funke that the bill he had presented must have been "*a copy*" which, by accident, had been written on a blank having the gold clause in it, and that he believed this until some time afterwards; that he then thought that Funke had made a copy of the bill and given it to Johnson and Higgins, "and by accident or design (because we intended

to sell the goods for gold), the bill was copied on that paper that had printed on it the words "payable in gold." On the same page he says that all this passed in the conversation between him and Funke on March 21; that the conversations were had certainly on that day, and that his memorandum of them was written on the same day at the Stevens House after Funke "Went to College Point." On page 448 he says that he came over from Staten Island on the morning of Saturday, March 21; that he met Mr. Funke at 57 Broadway, distant about five blocks from the ferry, and they walked to Mann's, Mr. Funke, as he thinks, having stopped a moment at defendant's store on their way to the restaurant.

In addition to his extended memorandum of these interviews of March 21, 1868, Sturm claims to have made another memorandum on the same day in his diary relating to the subject. Complainant introduced the diary entry. It is set out on page 285 of the record and reads as follows:

"Interview between Funke and Sturm about the bill of goods of September 18, 1867, which is attached to the invoice which Stocking made for Johnson and Higgins while Sturm was in Mexico. Stocking says that Funke gave him the bill and Funke says Stocking brought it to their store and asked about it when they wanted to furnish preliminary proofs to the companies. There is printed in the bill 'payable in gold' in red letters, which I have never seen before."

"Had several interviews with Funke about above bill, and everything is amicably adjusted—see memorandum of to-day with the letters of Sturm and Navarro attached. Memorandum written in Stevens' house, and the main talk at Franz Mann's when Funke was going home. W. F. S. memorandum also valuable." He says the signature to this memorandum is his, Sturm's.

If Sturm is to be believed in what he testifies to in his attempts to support by his "memoranda" as to the nature of this new contract upon which he seeks to recover, made in this interview of March 21, and made more definite, as he claims in an interview of March 27, 1868, it was a scheme

gotten up by Funke and agreed to by Sturm by which they would make a joint fight against the insurance companies at their mutual expense, and recover from the insurance companies the invoice value of the goods in gold at 45 per cent. premium, when in fact, if he is right, he and Funke both knew that the goods had been invoiced at currency prices and not in gold. If he is to be believed, this was a scheme to swindle the insurance companies out of the 45 per cent. and to divide the plunder On page 443, in answer to question 404, he says that at that time Funke said to him: "We will stand by you; we will make a joint fight in this thing and share alike according to the receipts, and the 45 per cent., gold, if there are any expenses, will be just that much to cover expenses—just that much. These were his remarks to me." As we have shown, he claims that this part of his conversation with Funke was of such a "private" nature that in repeating the conversation to his bosom friend, W. F. Stocking, at Mann's restaurant, in Funke's presence, he purposely omitted this part of the conversation, and omitted to repeat this part of the agreement, then alleged to have been made, and upon which he now sues. A bill in equity, grounded on such an agreement, if really made, violates the maxim *ex turpi causa non oritur actio.*

The alleged agreement, set up in the bill, as having been entered into on March 27, 1868, was in effect a repetition and defining of the agreement of March 21, and is subject to the same objection.

But the conversation of March 21, never was had. The allegations of the bill setting it up, are supported by the testimony of the complainant only. They are met by the denials of the verified answer, by the testimony of Mr. Funke, in denial, and by abundant corroborative proof.

Sturm says in his "diary entry," page 285, that W. F.

Stocking's memorandum of this conversation "is also valuable," and he testifies that Stocking made such a memorandum. It was never produced.

SNOW STORM OF MARCH, 21, 1868.

Mr. Funke was not in New York, on March 21, 1868. He was on that day snowed up at his residence at College Point, Long Island. The snow storm began on the evening of the 20th, and continued through the night, and was one of the most violent both in New York City, and upon Long Island that ever occurred. An account of it, as taken from the New York Herald, of Sunday, March 22, 1868, and from the Long Island Times, a weekly paper published at Flushing, Long Island, under date of March 26, 1868, is found in the record at pages 2590 to 2592, inclusive. These accounts show that the horse car lines in New York City were unable to run cars during the 21st of March, that on Long Island no such storm had been known within twenty years, the snow being four feet deep upon a level and seven feet deep at some places upon the railroads; that a snow plow with four engines attached left Hunter's Point, Long Island, early in the morning of the 21st, and had not arrived at Jamaica at three o'clock in the afternoon. That travel on all of the Long Island railroads was absolutely suspended during the 21st. That no trains ran. That the first train to arrive at Flushing from Hunter's Point arrived Sunday afternoon, March 22, after four o'clock. Mr. Funke's pocket diary under date of March 21, 1868, contains this entry, "Snowed up; stayed at home." (Record, p. 2187, Q. 53). Mr. Funke on the same page testifies that he made that entry on that day, and that he stayed at home that day. He testifies that he has kept such a diary since 1860, and that he has them except the one for the year 1874, which he lost during that year while traveling.

The complainant admits in his brief on page 29, that Mr. Funke did not, on March 21st, go from College Point,

his home, to New York City. He admits that Mr. Funke could not have done this owing to the snow storm. But his counsel argue that the evidence shows that Mr. Funke was in New York on March 20th, and did not go to his home that night but remained over night in the city. There was absolutely no proof that he was in New York over Friday night, until Sturm, late in the evidence, swore that he recalled that he was. In this part of their brief complainant's counsel closely follow the remarks of the District Judge. He referred to this diary of Funke as the "little pass-book," and says that the defendants' claim "that the memorandum was discovered in Indianapolis in a carpet-bag that Rabing brought from New York—that Rabing discovered it in his valise." Judge Woods, on page 109 of the record, after saying that he does not credit this diary entry makes this remark, "To say the least, the evidence that Funke was at home is no stronger than that he spent Sunday in New York." There was no evidence that Mr. Funke spent Sunday in New York, and no witness testified that he thought Funke spent Sunday in New York. Sturm's own memorandum, if it is good for anything, shows that Funke did not spend Sunday in New York, for it states under date "4:00 P. M.," March 21, "we went away soon after, as Funke had to get the boat," and Sturm explains in his evidence that this meant his boat that would take him on his way home, over to Long Island. (Pp. 1746–1747.) And he testified on page 447, cross question 433, that Funke, at the conclusion of the interview of March 21, "went to College Point."

There was nothing suspicious about this diary entry of Mr. Funke's, or about the production of it in evidence. Sturm was cross-examined in November, 1882. Mr. Rabing, the confidential book-keeper of the defendants, had been employed by them to assist their counsel in the taking of the evidence, and under that employment went out to Indianapolis in November, 1882, to assist at the cross-

examination of Sturm. He took with him at that time a lot of Mr. Funke's pocket diaries. In the course of the preparation for Sturm's cross-examination he first noticed Mr. Funke's entry of March 21, 1868. He wrote to the defendants at once. The evidence shows that thereafter the newspaper accounts of the storm now in evidence were looked up. The evidence shows that the diary for that year abounds in other similar entries as to weather conditions. That they were made at the time and are truthful has, we believe, not been questioned.

Mr. Funke, in his testimony, shows that his course to College Point from New York was by ferry to Hunter's Point, and by rail from there to Flushing—nine miles—and from there to College Point—two miles—in his carriage or by stage. (Record, p. 2183.) He testifies that on Friday, March 20, 1868, that he was in New York City, as usual; that he went home that night and did not return to New York until Monday, the 23d. (Record, p. 2184.) He testifies that on Monday he learned that his partner, Mr. Schumacher, had been in like situation, owing to the storm, and remained during Saturday at his home in Rahway, New Jersey. He says he remembers that they talked over the subject on Monday, and that Mr. Boker, the only partner at the store on Saturday, spoke of his difficulty in getting the safe open. That he, Funke, and his brother-in-law, now dead, made several attempts, by doubling their teams, to get over to the railroad at Flushing, but that these were ineffectual. Judge Woods, in his opinion, says, with reference to Mr. Funke's evidence on this subject, (page 109): "The story about doubling teams and struggling through the snow in a vain attempt to get to the depot may be true; it may have happened. I do not say that it did not, but I say it is improbable that an *old man*, such as Mr. Funke was, would have made such effort to get to the city through such a storm."

The undisputed evidence shows that Mr. Funke was at that time only forty-three years of age. (P. 967.)

Mr. Funke, in answer to questions 1971–2 (record, p. 2201), says that he did not, on March 21 or any date near thereto, have a conversation with Sturm, such as Sturm alleges; and in answer to question 37 (record, p. 2184), he says he had no conversation with him on that day; and in answer to question 72 (record, pp. 2188–2189), questions 723, 724, 725 (record, p. 2250), he says he did not have the alleged conversation, said by Sturm to have occurred on March 21, then, or at any other time.

Mr. Schumacher, in his evidence of 1884 (record, p. 2829), testified that he and his neighbors in Rahway, New Jersey, were prevented from getting to New York City during Saturday, March 21, 1868, by the snow storm. He says that on his arrival at the store on Monday, he was informed that Mr. Funke had likewise been kept from the city on Saturday.

Mr. Boker in his examination of 1884 (record, p. 2506), testified that on March 21, 1868, neither Mr. Funke nor Mr. Schumacher reached the store; that Mr. Schumacher, when present, signed the firm's checks; that the checks issued March 21, 1868, were all signed by the witness, Boker. On page 2587, he further testifies that Mr. Funke had charge of the stock and usually made out the stock orders; that he looked through all the firm's copy books for that day but could find none of Mr. Funke's writing.

W. L. Seaman, a ship chandler living at Flushing, Long Island, and having no connection with the defendants or interest in the case, testified (record, pp. 2617 to 2624) that he is the executor of his brother, John A. Seaman, who also resided at Flushing; that, among other things coming into his hands from his brother's estate, was a series of diaries running back from 1884 for many years, all kept by his brother, in person. From the diary entry of March 21, 1868, he read in his brother's hand-

writing the following: "Snow; blowing terribly in the morning. Thermometer at 7:00 A. M., 28. Snow at noon; blowing a gale. Night overcast, with high winds. No cars to-day; stayed at home all day." (Record, p. 2619.) On cross-examination, he gave his brother's diary account of the weather for numerous other days running through the months of February, March, April and into July. (Pp. 2621, 2622, 2623.) Mr. Boker was, upon cross-examination and re-examination, requested to read Mr. Funke's diary entries for the same months. They are found on pages 2544 to 2546; and, upon comparison, it will be seen that, while Mr. Seaman's entries were in much greater detail, Mr. Funke's agree with them.

From the foregoing, it is apparent that Mr. Funke had no interview with Sturm on Saturday, March 21, 1868. The interview occurred on that day or not at all, for Sturm has dated his memorandum as of that day and, in his regular printed diary for the year 1868, under that date and day of the week, he has a brief reference to the interview of that date, in which he claims the new contract, on which he sues, was made.

This diary entry and concurrent memorandum are either true and genuine or fictitious. They are not true in part and fictitious in part. If any part of either is untrue, the whole of both should be discredited irrespective of defendant's contradicting evidence.

If these memoranda are true statements of fact, then Mr. Funke not only was in New York during Saturday, but he traveled from New York Saturday evening to his home at College Point. Sturm concludes his extended memorandum of the interview of March 21, 1868, under date "4:00 P. M.," with the remark, "We went away soon after, *as Funke had to get the boat.*" (Record, pp. 187, 188.) In his diary entry, referring to this same memorandum, he wrote: "Memorandum written in Stevens House, and main talk at Franz Mann's, *when Funke was going*

home." (Record, p. 285.) This reference in the memoranda to Funke's "going home" and to Funke's "getting his boat" was called to Sturm's attention in his cross-examination of 1885. (Record, p. 1746, etc.) On that page he first testified that he remembered very distinctly that Funke was intending to stop over night—Saturday night—in New York, but he, on the same page, modified this, and said that Funke was intending to stop over night in New York, on Friday, the 20th. We quote his testimony on the subject as follows:

Question 780. "Well, how do you wish it to stand, General, that Mr. Funke was, as you distinctly remember, to stay in town Saturday night, or was he to stay in town Friday night?

Answer. "He was to stay in town that night when I had the first conversation with him about the "gold bill," and when he told me to come, and we will talk it over tomorrow morning, and he said he was going to stop in town, and he did, and I saw him the next day; that was Friday night.

Q. 781. "You now think it was Friday night?

A. "It was Friday night, unless I am out of date altogether.

Q. 782. "That was the night of Friday, the 20th day of March, 1868?

A. "That is the night.

Q. 783. "That is the night that you refer to?

A. "That is the date when this bill was first talked about, first discussed; and he says, all right, we will talk it over in the morning, and I know that he stayed in town that night and was not out of town; and the next morning I met him, and that evening, and when I did meet him he went down to College Point, because I went with him part of the way to the boat; I recollect the thing distinctly.

Q. 784. "Saturday evening you went with him part of the way to what boat?

A. "To whatever boat he took, the ferry boat; I don't know; it is a sort of slip, what they call the slip."

In answer to question 808 (p. 1749), he says it was on that Saturday evening that Funke expressed "anxiety to catch the boat." In answer to question 918 (p. 1759), he

says that Funk said he was going to catch the boat, for otherwise he would not have put it into the memorandum, and in answer to the next two questions he indicates that he understood he was trying to catch a boat that would connect with the railroad train on Long Island.

As the undisputed evidence shows that no train ran to Flushing between Saturday morning and Sunday afternoon, the statement of the diary, that on Saturday evening Funke was, as Sturm left him, "going home," and the statement of the extended memorandum, that Funke had to "get the boat," and Sturm's testimony that Funke told him that he "was anxious to catch the boat," and Sturm's evidence that Funke went that night to College Point, and that he "went part way with Funke to his ferry boat," are all untrue. The verity of the memorandum is therefore impeached by evidence which the complainant, and the District Judge, in his opinion, admit is true.

If the new contract alleged to have been made in this supposed interview was really made, then Sturm is put in this position: His testimony in the insurance cases as to his personal liability to the defendants here for the value of the lost goods and as to the invoice of those goods being payable by him in gold, and Mr. Funke's testimony on the same subjects in those cases, was false and perjured.

If this contract was made, and this interview had as alleged, and Sturm was, as he testifies, then frequently and thenceforward during the insurance litigation advising with his counsel, Mr. Parsons, how came it that Mr. Parsons, three years later, wrote to Sturm in reply to a letter of Sturm's on that subject, telling him he must "now have an understanding" with the defendants relieving him from personal liability? (Pp. 589, 590.)

If this conversation was had and this contract was made as alleged, how came it that Mr. Parsons, a reputable and em-

inent lawyer, as Sturm's counsel, in July, 1868, the same year advised Sturm that it would be proper for him to make an affidavit to the insurance companies stating the invoiced value of the consigned goods to be $52,848, in other words, adding the gold premium to the invoice, and stating that Sturm's contract with the defendants required him, in case the goods were not sold, to either return them to the defendants or pay for them at the invoice price, and stating that Sturm at Boker's request had transferred the insurance "as collateral" security?

If this agreement was made, Sturm's detailed sworn inventory of the cargo, made August 14, 1868, used in all the insurance cases, was false. (Pp. 451, 453.)

Sturm claims that this new contract was repeated and made more definite in interviews had between him and Mr. Funke, and between him and Mr. Boker, on March 27, 1868, and this he sets up in his bill, and upon it seeks to recover. His memorandum of this interview is set out, page 288 of the record.

On pages 286 and 287 Sturm testifies that on March 27, he had an interview with Funke, and afterward with Boker; that on that day Boker & Co. had paid to Wilbur F. Stocking some money for insurance expenses which led to a discussion as to how the insurance expenses should be met and the account of them kept; that at that time he had with his bankers, Winslow, Lanier & Co. drafts for 4,000 pounds sterling about which the defendants inquired of him, suggesting that it would be to their mutual advantage, as they could use the money, if he would keep his bank account with defendants; that they were borrowers and would allow interest on the money and that it would be convenient for both if the insurance expenses could be paid without the knowledge of third parties; that defendants thereby induced Sturm to remove his bank account from W., L. & Co., to defendants. He there testifies also that the details of the conduct of the insurance suits were

then arranged, and he made his memorandum above referred to. On page 389, Q. 83, he testifies that it was then and there agreed that the expenses and receipts in the various insurance suits were to be shared between him and defendants pro rata. On pages 535, 536, 537, etc., on cross-examination he shows that he gave a voucher to the defendants, on that day, for $1,300, for money paid by them for insurance expenses. He is not clear in his own mind whether it was that much theretofore advanced by defendants or all advanced on that day. On page 538, Q. 1001, he shows that what he calls the "transfer" of his bank account to the defendants consisted in his taking from W., L. & Co. drafts which he had with them for collection for 4,000 pounds sterling and handing them to the defendants for collection. On the day his memorandum bears date, March 27 (Record, 540), he wrote defendants as follows: "In case Messrs. Winslow, Lanier & Co. have sent those documents to your satisfaction, will you be kind enough to let me have now $1,300? Should you give a check for this, be kind enough to make it payable to bearer, so that Mr. Stocking may get it. I have a couple of fellows waiting on me here. $1,300. "Yours,

"H. STURM.

"Will see you during the day. Received the above amount.

"H. STURM,

"Per S. D. STOCKING."

He seems on page 541, when first confronted with this letter, to have taken the position that the figures "$1,300" had been "raised." But finally admits or does not deny that he did call for $1,300 on that day. On the next day (p. 543), he received from the defendants, upon his written request and S. D. Stocking's receipt, $300. These two were the first payments of money by defendants to Sturm direct, and they are shown as the third and fourth items

in defendant's account filed with their answer. (Record, p. 67). From page 544 to 558 are numerous written requests by Sturm upon defendants for money, receipted in a similar way. On page 561, Q. 1,207, he seems to admit that he himself may have raised the figures in the letter of March 27, and to admit that whether he raised them or not he received the $1,300. No witness but Sturm testifies to the verbal agreement of March 27, set up in the bill.

Mr. Funke in his deposition of 1881, taken on the part of the complainant, in answer to complainant's counsel, testified (Record, pp. 976–977) that after Sturm's return from Mexico, and after the insurance companies had refused to pay the loss, there was a verbal understanding had between Sturm and his firm that Sturm had to collect the insurance himself and that the defendants had nothing to do with it. He there testifies that when he heard of the loss, Wilbur F. Stocking, "General Sturm's agent or right hand man at that time," came to him about it. On page 989 in the same examination he testified as follows:

QUESTIONS BY JUDGE CLAYPOOL—

Question 336. "Do you recollect of having any talk with him with regard to his withdrawing his account from Lanier & Co.?

Answer. "No, sir. I never talked money matters with him—anything about that.

Q. 337. "Don't you know he was having his account deposited with Lanier & Co. up to that time?

A. "Yes, sir.

Q. 338. "Don't you know that Lanier & Co. were paying him seven per cent. upon his deposits?

A. "No, sir. I do not.

A. 339. "Don't you know that they charged him $270 on an English collection just before that time?

A. "No, sir.

Q. 340. "Do you recollect of promising Mr. Sturm that you would pay him that, if he withdrew his account from Lanier & Co.?

A. "No, sir.

Q. 341. "You didn't do anything of that kind?

A. "No, sir. That is fiction.

Q. 342. "You had nothing to do with Sturm's withdrawing his account?

A. "No, sir. I never would have made such a blunder, either, as telling him that.

Q. 343. "Sturm had a considerable deposit at that time?

A. "That may all be.

Q. 344. "You were anxious to get money, weren't you?

A. "Not at that time, to get it. Afterwards."

This evidence was taken before Sturm had testified to his alleged verbal agreement, had on March 27, first with Funke, and then with Boker. Mr. Funke, in his deposition of 1884, page 2199, testified that before Sturm's return from Mexico, in the spring of 1868, Wilbur F. Stocking came to him and told him that the insurance companies were tampering with the witnesses, the persons who were on board the ship just before she went down, and that something should be done "until Sturm came;" that all the money he had was for Sturm's insurance notes, and he questioned the propriety of using it, and asked Mr. Funke's advice. Funke says he advised him to use it, as the amount, if the notes came due, could be deducted from the policies. In answer to questions 188–190, he says, that he did not tell Sturm that he had been keeping the Captain until Sturm's return; that he made no arrangement with the Captain, nor did he authorize Sturm to make arrangements with him. He says that was solely Sturm's business. That Sturm said he, Sturm, had to retain the Captain and Mate, and had to pay them, "but never said to me, that we jointly had to retain them or either of them."

Mr. Funke, in questions 200 and 201 (p. 2201), was asked with reference to the alleged conversation between Sturm and Funke, and Sturm and Boker, of March 27,

and he answered that as to moneys paid out on that day to Stocking for Sturm's account, he would have to speak from the books. As to the conversation, he answered: "All I know about it is that he wanted money, and he talked about a bill of exchange of 4,000 pounds on Winslow, Lanier & Co., and on which they would not advance him money. I referred him to Mr. Schumacher and Mr. Boker, and they arranged it with him. I, myself, never had anything to do with money affairs. They arranged it among themselves." He says, in answer to the next question, that he does not think any member of his firm suggested the keeping of Sturm's bank account with them, but Boker would know more about that, and concludes, "I have no doubt that General Sturm first accosted me on the subject, and then I referred him to Mr. Boker." The witness says, as for himself, he made no such suggestion to Sturm. He says that they arranged that DaCosta was to sue on the assigned policies, and Parsons on those unassigned, and that the attorneys were to assist each other. The witness examined Sturm's answer to question 73 (record, p. 286), in which Sturm says it was then agreed that all the insurance expenses should be borne jointly, and says that no such agreement was made. (P. 2202, q. 207.) In answer to question 210, pages 2202–2203, he said there was nothing said by him or Sturm about making it a joint fight; that nothing was said about the expenses being joint—"they were all Sturm's," he says. In answer to question 215, Mr. Funke said that nothing was said between them about keeping the bank account with the defendants for the purpose of keeping the insurance expenses secret. In answer to question 216, he says that Sturm said that W., L. & Co. would not advance him money against his drafts, and asked if the defendants would. "I referred him to Mr. Boker in regard to it, and they arranged it. He wanted money himself at that time." Being referred to Sturm's memorandum of the

alleged conversation of March 27, 1868 (record, p. 288), he says he knows nothing about the memorandum, and there never was, to his knowledge, any such agreement made as is therein set out. (P.p. 2203–2204.) In answer to question 2229, on the same page, Mr. Funke says that there was never at any time an agreement between Sturm and his firm that the receipts and expenses in the insurance suits should be shared pro rata. In answer to question 283 (p. 2205), Mr. Funke says that there was no agreement ever made to the effect that, when they came to settle, the expenses were to be deducted and the balance divided pro rata, and Sturm allowed fair remuneration for his time and labor in and about the suits. He says he never heard of such a claim until this action was begun. Mr. Funke, on page 2250, Q. 719, says that he did not, on March 27, or at any other time, agree with Sturm as to the invoice used in the Orient case as stated by Sturm in answer to cross-question 395, (page 440,) and says that the only agreement as to invoices was had at the time of the shipments. He says, in answer to question 720, that Sturm never intimated to him that the original invoice of September, 1867, did not contain the words "payable in gold;" that the first he ever heard of that charge was when Sturm brought this suit. He further says, on page 2251, Q. 735, that Sturm did not, on March 27, transfer to his firm in payment for his liability for the lost goods $40,000 of policies on the Keese, and $15,000 of policies on the Blonde, as testified by Sturm in answer to cross-questions 538–540. (Record, p. 469.) On page 2253, in answer to questions 758 to 765, Mr. Funke says that so far as he knows, his firm had, before March 27, 1868, only paid out for Sturm the two items charged in their exhibited account, viz., $46.50 and $200, and that he did not, on March 27, as Sturm testifies in answer to cross-questions 994, 995, 998, 1024 (record pp. 536, 537, 538 to 540), on that day, tell Sturm that defendants had paid for insurance ex-

penses $1,300; but says that on that day they did pay to Sturm, on his written request, the $1,300. As against Sturm's statement in answer to cross-question 1255, page 569, to the effect that after the transfer of the bank account, on the same day, a "joint account" for the insurance expenses was commenced, Mr. Funke, in answer to question 787, page 2256, says: "We never had a joint insurance expense account or a joint matter." He says, in answer to the next question, that Sturm did not, upon an understanding with him, lend the Captain of the ship $2,000, as testified by Sturm in answer to cross-question 1270, page 571. In answer to question 862 (p. 2263), he says that he never, at any time, told Sturm that his firm would pay anything toward the expenses or services of Sturm in the insurance suits, as testified to by Sturm, in answer to cross-question 3600, on page 894.

Mr. Boker, in his testimony of 1884 (pp. 2455, 2456), states that he never knew General Sturm or had any business with him until 1868. That in March of that year, he thinks it was between the 23d and 25th, one of his partners, he doesn't remember which one, told him Sturm would like to have some money; that Sturm had a lot of bills of exchange with W., L. & Co. for collection, and that Sturm would like to talk with him, Boker, about it and that Sturm did then talk with him about it. (Q. 22, p. 2456.) He says that, either the same or the following day, Sturm asked him if Boker & Co. could not give him some money. "I then told him if he could give us security or anything of the kind we might give him some money, or loan him some money. He told me he had 4,000 sterling with Winslow, Lanier & Co., and that Winslow, Lanier & Co. would not give him any money on those 4,000 as they were only given for collection, and they could not know whether they would be paid or not. I then asked Sturm to have those transferred to us and that we would give him the money. He then saw Winslow,

Lanier & Co. and they transferred the 4,000 pounds to us, that is to say, they wrote their correspondents in England to pay over the proceeds of those bills, when they became due, to our correspondents, Messrs. Horstman & Co., of London, for our account. We then, upon notification of Messrs. Winslow, Lanier & Co., paid the first money to Mr. Sturm." (Q. 23, p. 2456.)

Mr. Boker, on page 2457, sets out a letter received by his firm from Winslow, Lanier & Co., dated March 26, 1868, in which they say that, according to Sturm's request, they had directed their London correspondents to put to Boker & Co.'s credit with Horstman & Co., the proceeds of the 4,000 pounds sent for collection for Sturm. They also say they enclose, "as requested, the thirds of the bills referred to." He says this letter was received either on the 26th or 27th; that, except the conversation given in answer to question 23, above quoted, he had no further talk with Sturm until after the payment to him on March 27, of the $1,300, and that that was paid in compliance with a letter received from Sturm that day. (Pp. 2457, 2458.) He says that that letter was received by Mr. Funke, to whom it was addressed, and on the day of its date it was handed by Funke to witness, and that it was then in the same condition that it is now and that at that time the figures "1,300.00" after the words "let me have now," were in the letter just as they are now. He says that he is well acquainted with Sturm's handwriting and that the letter of March 27, including the figures "1,300.00," was written by Sturm. (Pp. 2458, 2459.)

Mr. Boker further said that he had no knowledge of any agreement made between Sturm and Funke, that the bank account should be transferred to "facilitate matters," as testified to by Sturm in answer to question 9, page 167. He says, in answer to question 64 (p. 2460), that Sturm told him, in the conversation before mentioned, that his bank account with W., L. & Co. was "pretty well

drawn down;" that he had to have money to prosecute the insurance suits and for his private use; that he asked Mr. Funke if he would open a bank account for him, as W., L. & Co. did not wish to advance against the English bills, as they were not due; that to secure us he would transfer those bills to whom we might nominate. Mr. Funke referred him to Boker, as the member having charge of financial matters. "At that time I had full confidence in Sturm, and I took the risk that the bills might not be good; but still I took the risk, and after W., L. & Co. notified us, etc., * * * * * we made him the first advance of $1,300.00. Those bills were not due until May; about May 15 to 19; somewhere about that time; after the middle of May; and if the bills had not been paid by the house in England, we would have had to look to Sturm for the advances, but as the bills were good, I thought there was no risk in taking them." (Boker p. 2460.)

Boker says, in answer to question 66 and following questions, that nothing was said about it being unwise to pay insurance expenses through a bank nor about a "joint account," nor about Sturm managing the litigation, the witnesses, etc. (P. 2460.) He says he has no knowledge of the conversation which Sturm purports to quote in his memorandum dated March 27, 1868, as set out under question 11 (p. 168). He examines that memorandum and says that he never heard of any of the agreements in it recited until he saw Sturm's testimony in this case. (P. 2461.) In answer to question 103 (p. 2463), he says that he had no knowledge concerning Sturm's financial means, as stated by Sturm on page 330, and that, in July, 1868, he, Boker, made inquiry through Bradstreet's agency, as to Sturm's means, the letter of inquiry being set out on page 2464.

Sturm's testimony shows that his memoranda all speak in the present—not in the past—that his memorandum of

March 27, 1868 recites things done and words spoken on that day and on no other, and the same is true of his memorandum of the next day. These two memoranda are set out in his testimony in chief. on pages 288 and 289 of the record. In that of March 27, among other things, he says, speaking of things that day agreed to between him and defendants: "To facilitate matters and save time and accounting, etc., Sturm is to withdraw his cash account from Winslow, Lanier & Co., and deposit his funds with H. B. & Co." The testimony of Mr. Boker before quoted shows that the arrangement to transfer the bank account was made with Boker in person; that it was made for Sturm's accommodation purely; that on March 27, it could not truthfully be spoken of, as Sturm speaks of it in his memorandum of that date, as a matter to be accomplished in the future. Sturm's letter of that date to Funke, asking for the $1,300, begins with this expression which evidently refers to the duplicates of the English drafts: "In case Messrs. Winslow, Lanier & Co. *have sent* those documents to your satisfaction, will you be kind enough to let me have now $1,300?" (Pp. 540–541.) He had therefore arranged with the defendants for the transfer of his bank account long enough before March 27 for him to expect that the necessary papers would have been received from the bank by the 27th of March. His letter disputes his memorandum. The letter of Winslow, Lanier & Co., above quoted, shows that on March 26th they had already notified their London correspondents of Boker's right to the proceeds of the English drafts and shows in its concluding clause that either on that day or before Boker's had requested of W., L. & Co. that they should deliver to Boker's "the thirds of the bills." (P. 2457.) Sturm's memorandum of March 27, wherein it says "Sturm *is to withdraw* his cash account from W., L. & Co.," disputes this, a letter from a disinterested third party. Sturm's memorandum dated March 28, 1868, says: "I have to-day

withdrawn my account from Lanier's. The four thousand pounds sterling I have deposited with H. B. & Co. for collection." (P. 288.) This memorandum also recites a falsehood. Sturm's letter and the testimony of the defendants agree. Sturm's memoranda disagree with every other writing and are only supported by Sturm as a witness.

From what precedes, we submit that the complainant failed to prove that the new contract of March 21 and 27, 1868, was ever entered into between him and the defendants. In addition to the positive denial of the defendants, as to the interview of March 21, the evidence that Mr. Funke, with whom Sturm claimed to have talked, was not in the City of New York on that day, is we think irresistible. As to the alleged interview of March 27, at which Sturm claims the agreement was made more definite, in addition to the positive denials of the defendants, the letter of Sturm and the letter of his bankers both show that at least one of the subjects which Sturm claims was discussed on that day as still tentative, and the feasibility of it considered, viz., the transfer of the bank account, had been actually discussed days before and was a consummated matter before that date.

Sturm claims to have had numerous other interviews with one or another of the defendants bearing more or less remotely upon the theory of his bill as to the making of the alleged new contract of March, 1868. As to all of these the defendants deny in their testimony that such conversations, as Sturm's memoranda record, occurred either on the dates alleged or at any other time. As to several of them it so happened that the defendants were able to show that the person with whom Sturm claimed to have talked could not possibly have met him at the time and place his memorandum states. The defendants' evidence bearing upon such of the conversations is considered in complainant's brief beginning on page 30, under the head "alibi."

Interviews of June 12 and 17, 1872.

Sturm in his testimony beginning on page 298, direct question 137, testifies that on Monday, June 12, and Saturday, June 17, 1871, he had interviews with Mr. Schumacher; that as requested in the letters of his counsel, Mr. Parsons of May 1 and 16, and June 3, and a telegram from Mr. Schumacher, he, Sturm, went from Indianapolis to New York for the express purpose of talking with Mr. Schumacher. The alleged telegram from Mr. Schumacher was never produced. The Parsons letters are set out on pages 2975, 589 and 590 respectively, and it will be seen that neither of them requests Sturm to come to New York, and each of them shows that Mr. Parsons expected to "hear from," but not to see, Sturm. Mr. Parsons, the testimony shows, was living when this testimony was being taken, and could have been, but was not, examined as a witness. Sturm's memoranda of those interviews are set out on pages 302 and 303, and on page 588 he adds to each of them, under cross-question 1422, matter that he says he omitted in first setting them out. His testimony on cross-examination respecting these interviews is found on pages 577 to 590, inclusive. He admits that at this time he did not see Mr. Funke, he being in Europe, and that he did not see Mr. Boker. (P. 587.) He says that the conversation of June 12 was in several parts, and was had at the defendants' store and Kirk's saloon, and that the conversation of the 17th was at Spahr's restaurant, and that he gets none of this from memory, but all from his memoranda. (Pp. 583, 584.) In his examination of 1885 (p. 1775) he changes this and says that he did not see Schumacher at his store, but met him on the street, and the conversation all took place at Kirk's saloon. Without quoting it, we call the court's attention to his testimony on pages 1775 to 1792, bearing upon these supposed interviews, in which he materially contradicts his earlier state-

ments. We think the evidence now to be referred to establishes that neither of these interviews took place, and that the memoranda of them are fabricated.

Mr. Schumacher, in his deposition of 1884, beginning on page 2832, testifies that these interviews were not had; that on the 12th of June he, Schumacher, was in Washington City; that at that time his residence was in Bleeker street, New York; that he left New York on Sunday evening with Col. Crispin, U. S. Ordnance Officer at New York for Washington; that on arrival at Washington, Sunday night, he and Col. Crispin went to the house of General Dyer, chief of the Ordnance Office of the United States, in the General's carriage, and remained with the General visiting him at the arsenal until 3:00 o'clock on the afternoon of Monday the 12th; went on board a steamer on the Potomac and departed for Fortress Monroe, where they arrived on the morning of the 13th; where they met Colonel Baylor, the Ordnance officer there, and Captain Adams, the Government Store-keeper. He says that while he was in Washington he bought some wine and whisky from his friends Shoomaker & Hertzog, and had it sent to the boat; he says that he and his two traveling companions remained at Fortress Monroe from the 13th to the 17th of June inclusive, inspecting the fortifications and recreating. That he and his party left Fortress Monroe in the evening of Saturday the 17th, by steamer for Washington City, where they arrived Sunday morning, and that he and Colonel Crispin visited with General Dyer until Sunday night, when they left for New York by rail, arriving there on the morning of the 19th; that they were met at the Des Brosses street ferry by Colonel Crispin's carriage, in which Colonel Crispin took the witness to his, the witness' house, in Bleeker street. (Pp. 2832 to 2835.)

He says that he did not see General Sturm on June 12th or June 17th, or between those dates. General Sturm, in

answer to questions 141 and 142 (p. 299), testified that just before June 12th Schumacher sent him a long telegram, for which Sturm paid $4.80 charges, calling him to New York. Mr. Schumacher, on page 2836, Q. 239, says that he knows nothing of such a telegram; that he can find no copy of it, and that he never at any time telegraphed at Sturm's expense. He says that he did not see Sturm at all between the 10th and 20th of June.

On June 24, 1871, Schumacher wrote Sturm a letter, an extract from which is set out in Sturm's cross-examination of 1882, under cross-question 1331 and following questions (p. 579) part of which Sturm there translates from the German as follows: "I am very sorry not to have seen you here the Sunday before *your* departure. I had expected you the whole day." Sturm says at that place that the word which he translates "your" before the word "departure" is indicated by a sign: "It is an abbreviation," he says That it looked like an m "with a line drawn straight down." Asked what German word such a mark stands for, he replies, (p. 580, X. Q. 1336) "there is no German word like it. There is an abbreviation there that Mr. Schumacher can make out to suit himself. I do not know anything about it. I only give you what I believe to be his meaning. I do not know what he meant by it." He says that the German word for "my" is "meiner" and for "your" is "ihrer." On page 581 he gives a fac simile of the abbreviation referred to thus:

"mf"

He says he does not know what Sunday Mr. Schumacher refers to unless he did not know that he, Sturm, left New York for Indianapolis on the evening of Saturday, June 17, and supposed that he was still in New York over Sunday, the 18th.

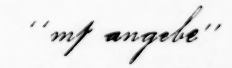
It so happens that Sturm had had occasion in an earlier part of the testimony, to translate in another letter from

Schumacher this same sign. We refer to the letter of April 19, 1871 (record, p. 2845). The translation is produced in evidence under cross-question 338 of Schumacher testimony of 1884. The witness states that Sturm made the translation which he produces in evidence. In this letter this occurs: "Stiegler departed on Saturday. I have tried, upon Southard's advice, to obtain his deposition, but upon again conferring with Parsons and upon *the* statement that S. is not an independent merchant, but a clerk of Roberto Boker, Parsons came to the right conviction," etc.

In Sturm's cross-examination of 1885 (Record, pp. 1791–1792), he gives the German of the sentence quoted from the letter of June 24, 1871, and then gives the German of the sentences above quoted from the letter of April 19, 1871, and says that the sign or abbreviation set out above, as found on page 581 of this record occurs in both letters. He then, under cross-question 1221, page 1792, translates again the language from the April letter, as follows: "Steigler departed on Saturday I have endeavored upon Southard's opinion to obtain his deposition, but upon conference with Parsons and upon *your* statement that S. is not an independent merchant but a clerk of Robert Boker, Parsons came to the correct conviction," etc.

Schumacher explains (p. 2846) that Steigler, at the time this April letter was written, was in New York.

Sturm was in Indianapolis. Sturm could not in the interview between Schumacher and Parsons, spoken of in the letter, have suggested that Steigler was not a merchant but only a clerk. He understood when he first translated that letter (p. 2845) that the suggestion had gone from Schumacher, the writer, to Parsons, and therefore rendered the expression



into English "*the* statement." But when he later on found it useful in translating the same symbol in the letter

of June 24, to render it "your" instead of "my," the word intended, he revised his earlier translation of the April letter, and rendered it "your."

On page 2837, question 254, Schumacher, in 1884, testified that he wrote the letter of June 24, on that date, in New York; that the sentence quoted from Sturm's translation (pp. 579–581) reads and should be translated, "I am sorry not to have seen you before *my* departure. (Your departure is wrong.) I had waited for you the whole day." He says, under questions 255, *et. seq.*, that the symbol used for "my" is common with him, that it stands for "meiner," and is in fact the letter "m" with a diagonal stroke following it.

Sturm gives no reason for calling this abbreviation "your," while the sense in at least one of the letters requires it to be translated "my." Schumacher's explanation that it is the first letter of the word "meiner," in the absence of reason to the contrary, requires that it be rendered uniformly "my."

If then, on June 24, Schumacher regretted that his departure had prevented his seeing Sturm, it was necessarily his departure for Fortress Monroe, which, to have prevented a meeting with Sturm, must have occurred before Sturm's arrival in New York on June 12, 1871. Schumacher and defendants' witnesses testify that Schumacher left New York Sunday, June 11. If this letter regrets Schumacher's failure to see Sturm before June 12, it can not also refer to a failure to see him after Schumacher's return from his trip.

The books of the defendants in which Schumacher was accustomed to write daily, show none of his writing on June 12 or 17, or on any intermediate date, as is testified to by Mr. Boker. (Record, p. 2587, q. 1210; p. 2588, q. 1214.)

Mr. Boker, in his testimony of 1884 (pp. 2509–2510), says that Mr. Schumacher was at, or near, Fortress Monroe from June 12 to 17, inclusive. That he, Boker, was the only partner at home at that time, Mr. Funke being in Europe; that he, Boker, was quite young, and the con-

current absence of both of his senior partners made an impression upon his mind which aids his memory; and that he has searched for, but has been able to find no check signed by Schumacher, and no copy of a letter signed by him, on or between those dates; and that all such papers, as were usually signed by Schumacher, he finds were signed by him, Boker. (P. 2510, q. 509.)

Mr. Boker, in the defendant's letter book, "A No. 14," running from March 22 to October 5, 1871, on pages 240 and 241 thereof, found a letter written by John Rabing, addressed to Mr. Schumacher at Fortress Monroe, Virginia, dated June 12, 1871, (p. 2510, q. 510 *et. seq.*) The letter is in German and the witness sets out a translation of it on page 2511.

The letter gives a somewhat detailed statement of the day's business, orders received, notes taken, etc., and in the middle of it, has a remark bearing upon the matter in hand. We quote from the letter:

"To-day at noon Mr. Sturm was here; will go, however, as you are not in New York, for a few days to Washington, and you will, on receipt of this no doubt have already heard from (him) per telegram."

The original of this letter upon search, could not be found. (P. 2510.)

On pages 251 and 252 of the same letter book, Mr. Boker found another letter of Rabing to Schumacher at Fortress Monroe, dated June 14, 1871. He translates it. (P. 2512). This letter refers to the other. It gives a summary of the business done, especially as to receipts. Near the close of the letter this is found:

"General Sturm has changed his mind, and does *not* go to Washington. He therefore has not telegraphed you."

Rabing (p. 3198, q. 617 *et seq.*) testifies that Mr. Schumacher was out of the store from Saturday, June 10, to Monday, June 19, and identifies the two letters to Schumacher, of June 12 and 14, as letters he wrote and sent him.

These letters are found in their proper place by dates in this letter book, and we believe that their genuineness has not been questioned.

Mr. Boker produced the defendants' foreign letter book marked "C. H. and A." running from April 21, 1869, to August 15, 1871. On pages 447 to 448 of this book he finds a letter of Mr. Schumacher at New York, to Mr. Funke in Europe, dated June 20, 1871. It was a lengthy letter and by agreement only a part was set out. (P. 2513). It says: "I was last week in Fort Monroe and Washington with Crispin & Dyer. We caught many fish."

A copy of a telegram of June 13, 1871, certified by General Sherman, Acting Secretary of War, from the War Department, was put in evidence, and is found on page 2515. It is by S. V. Bennett, Major of Ordnance to Thomas Poultney, of Baltimore, and reads: "Crispin, General Dyer and Schumacher now at Fort Monroe."

As a general rule Schumacher signed the firm's checks. In his absence, Funke or Boker signed. All the checks, in regular order, by date and number, drawn on June 12 and June 17, and on intermediate dates, were produced, numbered from 2040 to 2057, and all were signed by Boker. (Pp. 2515, 2516 and 2524.)

The liquor firm in Washington, of whom Schumacher bought liquor for the trip, Shoomaker & Hertzog, was out of existence when this evidence was taken—both partners having died. A. W. Noak was their manager. He produces their "day book" for 1870 to 1873, which, he says, has been in his possession for about three years. On page 64 of this book is an entry, but one from the bottom of the page, under date "June, 1871," as follows:

"SHOEMAKER & FUNKE."

12.	1 doz. qts. beer.....	$7 00	
	2 botl. B. whiskey.....	5 00	
	1 case of Leoville.....	20 00	Little book.
		$32 00	

The witness says that the entries above, on the same page, show three sales on the 9th and three on the 10th, and the next entry below is the 13th. The book

is full from the first to the last page. The entry is in the handwriting of Mr. Shoomaker, and the figures in the hand of his partner, Mr. Hertzog. The book has been kept at the store from the time it was filled until used in evidence, and witness believes the entry to have been made on June 12, 1871, as it purports. (Noak of 1884, pp. 3124, 3125.)

The complainant also examined this witness in 1885. (P. 1420). This evidence was intended to impeach the book. The witness sets out all of the entries on page 64 of this "day book," and details the handwriting of each entry. He also shows that there is an entry at the top of page 65, dated June 13, followed by entries of the 14th, then one of the 22d, and then entries dated 15th, 16th, 16th, 17th and 16th (changed to 17th).

He says that the date of the Schumacher & Funke entry appears to have been changed from June 11 to June 12.

He says the first time he noticed the alteration his attention was called to it by Mr. Holman (one of defendants' counsel). He says that the "figures of the altered date" are in the handwriting of his deceased employer, William Shoomaker, and that he died August 30, 1883. On page 1425 the witness says the book has been in his possession since Mr. Shoomaker's death, and that the "2" over the "1" is in Shoomaker's writing. The book shows sales on Sundays. There is no evidence that the defendants had any connection with this book until it was put in evidence. The evidence shows that the date of the sale was changed at some time (time not shown) before Mr. Shoomaker's death, from the 11th (Sunday) to the 12th (Monday). We submit that this will not support the assumption of counsel that the order for the liquor was sent from New York by mail on Saturday and was entered on Sunday. As the change of date was made by a disinterested person, and was from a Sunday to a week day, it is clear that such change does not tend to disprove Mr. Shumacher's

evidence that he, in person, bought these goods on the 12th, and had them delivered on his steamer the same day.

The records in the Ordnance office at New York conclusively establish that Schumacher left New York on Sunday the 11th, and returned Monday the 19th. Charles J. McGowan was chief clerk in that office at the time; he was under Col. Crispin. He says he finds he signed all the official letters, such as were signed by his chief when at home, during the week June 12 to 17, inclusive, (P. 2611), and he testifies that Col. Crispin, as a disbursing officer of the government, was required to send in a statement of his funds at the close of business on each Saturday, and that if Col. Crispin was in town he was required to sign it in person; that the statement of Saturday, June 17, 1871, he finds from the records he, McGowan, signed as "clerk in charge" (p. 2632), and that he was only allowed to so sign when the Colonel was actually out of the city.

In the letter-press book of the Ordnance office at New York, on page 288, under date of June 10, 1871, is a press copy of a telegram from Colonel Crispin to General A. B. Dyer, at Washington, as follows:

"Expect to leave here to-morrow night; McGowan not expected until to-morrow; Schumacher will be with me." (P. 2637.)

In the papers on file in the same office is a telegram from Colonel Crispin to Mr. McGowan, dated Fortress Monroe, June 13, 1871, received at New York at 8:30 P. M., which reads as follows:

"Schumacher and myself arrived here to-day." (P. 2637.)

Mr. McGowan produced from the same office, the original of a letter by him to Colonel Crispin at Fortress Monroe, dated June 14, 1871, in which he acknowledges receipt of the telegram "this morning," and reports the condition of the business of the office. Also a letter of same character to Colonel Crispin, at the same place, dated

June 15, and one on the 16th. In the letter of the 16th he says, "Suppose you will be home Sunday morning." (P. 2638.) On the 17th he addressed a letter to Colonel Crispin at Washington. (Pp. 2639–2640.)

The 17th was one of the days Sturm, by his memorandum, "made at the time," says he saw and conversed with Mr. Schumacher. In the letter of the 17th, McGowan says:

"Your telegram from Fort Monroe just received, and I shall send word at once to Schumacher's family. * * * Shall expect you here Monday morning." (P. 2639.)

McGowan says he received a telegram on the 17th, which he can not find, announcing the proposed return of Crispin and Schumacher, and consequently he wrote that he would notify Schumacher's family. (Pages 2639–2640.)

Col. Crispin was also examined. (P. 2626.) He says that from June 11 to 19, 1871, he was at Fortress Monroe; that he left New York for Washington on the night of the 11th and that Mr. Schumacher accompanied him; that they were at Fort Monroe together and returned together, reaching home Sunday the 18th. He says Gen. Dyer made the trip with them, and that he is dead. (Pp. 2626 to 2631). Col. Baylor testified to the same general effect. (P. 2616.)

The record shows that the register of the boat on which the party traveled was destroyed many years before the evidence was taken, and therefore no evidence from that source could be produced.

All of these concurrent writings by disinterested persons corroborate Schumacher, Boker and Rabing as to Schumacher's absence from town on both June 12 and 17, and show that Sturm's testimony, his memoranda and his "letter" of June 25, to his friend Southard (p. 1558) are all fabricated.

February 2d or 3d, 1874, Interview.

Sturm claims to have had an interview with Funke in New York in February, 1874, in which the terms of the new contract, as to Sturm's release from liability, were again gone over, and of which he has a "memorandum, made at the time." As to this interview there is an "*alibi*," which is not noticed in complainant's brief. The memorandum is set out at page 1203. It is headed "New York, February 3d, 1874." It is in two parts. Each part is signed by Sturm and attested by Wood. The first part purports to give a conversation between Sturm and Wood only, over their breakfast at a restaurant. The second part purports to give a conversation between Sturm, Wood, Funke and Schumacher, at defendants' store. Funke does the talking, according to the memorandum. Sturm, when first examined about it, stated that he arrived in New York from Indianapolis on "February 3, 1874, on a telegram from Mr. Schumacher, dated February 1," and the record shows that he made this statement "after referring to his diary" (p. 335, q. 359). Wood testified that the conversation with Funke mentioned in the "memorandum," attested by him and dated "February 3," was had on that date (p. 1202).

Later on, in the examination of 1885, Sturm shifts this date, by again "referring to his diary," to February 2, 1874, and says that both the "diary" and "memorandum" are in error as to date (pp. 1870–1886). In his earlier cross-examination (p. 625, q. 1708), he says: "I was there (in New York) on Tuesday, February 3. That is all I know." And in answer to question 1719 (p. 626) he says he "left the same evening" that he arrived, "on February 3. I have refreshed my recollection by looking at the entry in my diary." But the date, February 3, although shown by both the "diary" and the "memorandum," and sworn to by both Sturm and his detective witness, Wood, was altered to February 2, and the evidence as to date all brushed aside by Sturm in his testimony of 1885 (pp. 1870–

1886). It is not very material whether he settles upon February 3 or February 2 as the date of this interview, for on neither date was Mr. Funke in New York.

Mr. Funke testified that he left New York Sunday afternoon, February 1, for Shelburn Falls, Mass., via Springfield. That he stopped *en route* over night and went over the mountains to Shelburn Falls next morning, February 2, in a sleigh, and that he started back by way of Springfield, Wednesday evening or Thursday morning; that the defendants were sole agents for the sale of the product of the Lamsom & Goodnow Manufacturing Co., of Shelburn Falls and were stockholders in that company, and that he was there to attend the annual meeting of the stockholders, which was held on Tuesday, February 3 (pp. 2189–2190). The minute book of the stockholders shows that the meeting was held on Tuesday, the 3d, at 2 P. M., and that Mr. Funke was present (p. 2191).

Mr. Boker testified that Mr. Funke left for Shelburn Falls February 1st (pp. 2500–2501) and that he and Mr. Funke were accustomed to go there in the Lamsom Co. business. Mr. Boker produced the original of a letter written by Julius Wilhelms, one of his clerks, to Poultney, Trimble & Co., Baltimore, dated New York, February 2, 1874, upon which was a postscript in Mr. Schumacher's handwriting, reading as follows:

"P. S. Your favor of 31st of January received. *Mr. Funke will be here on Thursday.* Wood goes to Buffalo to-night, and from there to Washington. Will keep you posted when he is there. Yours, F. S." (P. 2502).

The letter-press copy of this letter, as found in defendants' press book "A No. 21," at page 156, was introduced. (P. 2502). The original of the letter of Mr. Poultney to which the postscript replied was identified (p. 2502), and the witness shows that the letters in the press-book run regularly as to dates and that the index shows the letter on page 156 to be the third in a series of six letters to Poultney. (P. 2503.) The letter books show none of Mr.

Funke's writing after Saturday, January 31, on which day his letters appear until February 7.(P. 2504). On February 5, 1874, Schumacher wrote Poultney & Co., Baltimore, saying: "*Your favor of January 31 was received, on which we informed you that Funke was out of town and would be back Thursday,*" etc. (P. 3200). On January 31, 1874, he had wired them: "*Funke out of town; back Thursday.*" (P. 3062.)

Mr. Schumacher says that Mr. Funke was at this time at Shelburn Falls, and that the conversation recited in the "memorandum" was not had with either him, Schumacher, or with Mr. Funke. (P. 2863, also p. 2908 and p. 2924.)

The register of the Massassoit House, of Springfield, Mass., for 1874, was produced in evidence. Judge Claypool, complainant's counsel, states its showing from November 12, 1873, to March 13, 1874, and says the last entry under Sunday, February 1, 1874, is "Hermann Funke, New York, room 12, lodging," and that under date of Wednesday, February 4, 1874, on the fifth line below the date is "Hermann Funke, New York," followed by a large number of other names. (P. 3119–3121.) see also Funke pp. 2434–2436.

Mr. Rabing examined these signatures, and pronounced them to be in Mr. Funke's handwriting (p. 3121). The book itself was shown to be the genuine register of the hotel, by an affidavit made by the clerk, William H. Chapin. (Affidavit admitted by agreement, pp. 3121 and 2449.)

Mr. E. G. Lamsom, President of the Lamsom Co., was examined, and said that Mr. Funke was present at the meeting of February 3, 1874; that he kept, and had for twenty years, kept a private record of the meetings, and in that record, made on that day, Mr. Funke was noted as present at the meeting, and further, that he remembers that he was so present. (P. 2643 *et seq.*)

On March 8, 1874, Sturm, at Indianapolis, wrote Schumacher a letter in German. It referred to the fact that Sturm had recently seen Col. Wood in Buffalo. On his

cross-examination, in 1885, he was shown the original of this letter, and asked to translate the sentence referring to his seeing Col. Wood in Buffalo, pointed out by the examining counsel. He refused to do so until he had read over, to himself, the whole letter (p. 1878), and being asked why he hesitated, said (p. 1878): "Because I can not translate it correctly. Now, Col. Wood, whom I —— in Buffalo, has told you that I have approved of Parson's idea," etc. (P. 1878).

That language, taken with Schumacher's postscript to Poultney, of February 2, shows that there had been no meeting between Wood, Sturm and Schumacher in New York, but that Wood only had stopped in New York on the 2d of February on his way to meet Sturm in Buffalo on the 3d, and that was the reason the complainant was so embarrased when asked to translate his own letter. This letter shows that Sturm had not seen Schumacher for a long time, for it contained this language:

"Weeks since, I intended to write you and Funke, but I have really, *since New Year*, had not a single night of undisturbed sleep, and I can almost say that I came very near getting crazy; any how I did get gray hair, and I have grown ten years older during the last four months." (Sturm's cross-ex., 1882, p. 633.) Then follows the matter about his seeing Col. Wood in Buffalo.

If he had seen Schumacher in New York in February he would not, as early as March 8, have so written. This is a letter to a friend not seen for at least three or four months; "since new year."

We are not surprised that complainant's counsel were willing to pass this "*alibi*" of February 2 or 3, 1874, without comment. The "memorandum" could not outweigh the other writings, and if it went down as a fabrication, complainant's witness, Wood, who had "attested" it and sworn to it would be thereafter damaged as a witness.

Sturm's letters and all the writings corroborate Funke's Boker's and Schumacher's evidence and overcome Sturm

and Wood, with their "memorandum" "made at the time," even the date of which Sturm does not trust.

WOOD CONTRACT.

Complainant's counsel from page 35 to 41 of their brief, make certain observations as to a contract claimed to have been entered into in March, 1872, between Sturm and his witness, Wood, whereby Sturm was to pay Wood, for professional services as a detective in his insurance cases, ten per cent. upon Sturm's collections on the policies. Alleged correspondence between the two is also given. These "letters" are vouched for by the same two persons who "sign" and "attest" the "memorandum" of February 3, 1874, and if important here should be taken with a degree of allowance. But we see no good purpose in following up what Sturm was doing or engaging to do with Wood. His relations to the defendants can not be established by his writings with Wood even if they existed as complainant claims. The defendants testify that they did not see this contract until long after Wood's services had ceased and knew nothing of it or of its terms, and that they did not see or know of any of the letters referred to in complainant's brief. (Pp. 2280, 2281, 2372, 2839, 2895, 3014, 3015.)

The defendants show in their testimony above referred to that they understood Wood had been employed by Sturm and was Sturm's agent in the cases, and they treated him accordingly. Sturm paid him from time to time by drawing upon the defendants in Wood's favor, the defendants paying the drafts and charging them to Sturm's account.

This was not the only attempt Sturm made to part with the proceeds of his policies before the money was collected. It came out in the evidence in this record that in the same year, 1872, he made a contract with Aegedius Naltner, of Indianapolis, by which he transferred to

Naltner for services, etc., 50 per cent. of any moneys that might be collected upon the same policies. This contract is set out at page 1155 of the record. The Wood contract (p. 1013), "transfers and makes over" to Wood his per centage. The Naltner contract was very similar, and they were in force, if Sturm's evidence is true, at the same time.

Is it probable that the defendants, knowing that Sturm had bargained away 60 per cent. of his collections, would have gone on for years advancing him money as they did in this insurance litigation? Isn't it more probable that they are right when they say that they did not know of these contracts or they would not have advanced the money, for they looked in part to the collections for repayment?

OFFER OF COMPROMISE BY INSURANCE COMPANIES.

Under this heading on page 45, complainant contends that because in May, 1871, the companies offered to settle at 50 cents on the dollar, and the defendants did not favor acceptance, it follows that they considered that Sturm was not liable to them and that they must look to their policies for all they would get against the value of the lost goods. The letter of Sturm to Schumacher of March 10, 1871 (p. 2972), is referred to as showing that Sturm was willing to accept an offered sum in compromise. That letter merely asks whether it is true that "the New York Mutual made you propositions of settlement? Can anything be done to get at least one company out, or could I sell one of the judgments?" The New York Mutual was one of the policies assigned to the defendants.

The burden of this letter was Sturm's prospects for getting an official appointment at Washington. The insurance matter was referred to only casually. Schumacher's reply, dated March 11, referred to as showing that defendants did not favor compromise, was of the same char-

acter, but it states that the "New York Mutual had indeed inquired about compromise," and that Mr. Funke had conferred with DaCosta about it, "but up to the present we have not heard anything." This was not a favoring by Sturm of any particular offer of settlement nor a discouraging of it by defendants. The whole matter was at most only tentative. The next letter of Sturm's, referred to by counsel (p. 3040), March 14 (complainants brief, p. 48), was entirely about his quest for office, and did not mention the subject of a compromise. The same is true of the letter of Schumacher to Sturm of March 15 (p. 3040,) referred to by complainant on the same point. It, also, was entirely upon the subject of Sturm's hoped-for appointment to the office of "Inspector General of steamboats," and defendants' friendly efforts in his behalf. The same is true of the letter of March 23d, Schumacher to Sturm (p. 3042).

Having cited the court to these letters, which do not, as is claimed by appellant in his brief, tend to prove that Sturm favored and defendants discouraged a compromise, appellant's counsel, on page 49, finally resort to another specimen of Sturm's *ex parte* writings "made at the time," viz.: his "memorandum" "on a letter head" and "transferred into a private memorandum book," etc. In this memorandum, as usual, he has Mr. Funke, on April 3, 1871, telling him that the defendants will "throw away their claim," etc., rather than take seventy-five or eighty cents in compromise. Funke claims he had no such conversation with Sturm. But let it be assumed that the defendants considered a compromise at fifty cents too low, does that prove that Sturm was not liable? They and Sturm were friends. They were aiding each other in the litigation, and the defendants quite naturally had views as to how much the companies should pay. We now again refer to the correspondence between Sturm and Parsons, his attorney, as showing that at this very time, while his counsel was writing him in May and June, 1871, on the subject

of a possible compromise, he was also urging Sturm to get a release from personal liability to the defendants before he, Parsons, would consummate any compromise. The letters of Parsons to Sturm were put into this record by Sturm. They are set out at pages 589 and 590. (See also pages 22 and 23 of this brief.) From these letters it follows that, if it is true that the defendants were inclined to ask for more than Sturm was willing to accept in compromise, they were not moved thereto, as appellant contends, because Sturm was not personally liable to them.

On page 54 of their brief, appellant's counsel contend that Parsons was in error when, in the letter of May 29, 1871, he quoted Sturm as having said he admitted a personal liability to H. B. & Co. for the value of the lost goods. They do not explain how, in his next letter to Sturm, June 3, 1871, answering Sturm's letter of June 1, he happened to repeat the error. Was he also laboring under a like error on July 8, 1868, when he indorsed his approval on the Funke-Sturm affidavit of July 14, 1868, in which it was stated that Sturm insured the consigned goods in his own name, and at Boker & Co.'s request assigned to them some of the policies "as collateral security," and in which it was also stated that Sturm was, in case the goods were not sold, to return them to Boker & Co., "or pay for the same the invoice price thereof?"

CONDUCT OF PARTIES.

Under this title, complainant's counsel in their brief, beginning on page 63, make divers observations, some of which we may now consider. They say that Sturm in 1868, upon Funke's advice, purchased $2,300 of the stock of the Flushing Railroad, in which Funke was interested; that Sturm afterwards, when in financial distress, sent the stock to Funke to be sold, "but Funke never made any accounting" for it. Sturm's evidence on this subject is found at pages 209 *et seq.*, 332–333, 637 and 638, 960 to

963. The defendants admit that they received the stock, but say, that while they made diligent effort to sell it and also their own stock, all such efforts were unavailing and that they still have on hand their own stock and Sturm's stock, and that it is of no value, and has had no market value, since Sturm ordered his sold. (Pp. 2104, 2158, 2223 2264, 2265.) In the course of the taking of the testimony, the defendants offered to re-assign and deliver Sturm's stock to him, but he said he would not accept it. (Q. 4005, p. 960.)

On page 64 of appellant's brief, his counsel assert that Sturm, after August 5, 1873, being in financial distress, asked assistance from the defendants and wrote them that he had "advanced all the money for the expenses of the insurance litigation." They say that about October 25, 1873, Sturm wrote that the bank was pressing him, and he asked them if they could not "raise money on life insurance policies of his that they had in their hands." The appellant contends that because the defendants in reply stated that they were unable to assist Sturm, but failed to remind him of his indebtedness to them, that therefore it can not be that Sturm was really owing them. They say that their position is supported by the numerous letters referred to on page 65, of their brief. These letters are there referred to by appellant's arbitrary system of numbering, but they can be identified by the list of letters given at the end of that brief. Many of these letters, which they claim passed from Sturm to the defendants, are clearly spurious. The genuine letters do not tend to prove appellant's contention. We shall first notice the genuine letters.

The second letter referred to (appellant's No. 328) was a letter from Sturm to Funke, dated October 14, 1873; was produced by the defendants in the cross-examination of Sturm, of 1882, and is set out under cross-question 1675, page 615. It had nothing whatever to do with the business relations then existing between Sturm and the

defendants. It made no request of the defendants for money by way of loan, advancement, or otherwise; it did not mention the life insurance policies. It laid before Funke the scheme of a partially constructed "Belt Line" railroad at Indianapolis, in which some of Sturm's friends were interested, and solicited Funke to take an interest in it and to interest his friends. It stated that such an arrangement would be to the financial advantage of both Sturm and Funke, and that a Mr. Ritzinger, of Indianapolis, had left for New York in furtherance of the scheme, carrying a letter of introduction from Sturm to the defendants.

The letter was answered by Mr. Schumacher by his letter of October 22, 1873 (appellant's No. 346), which was called out by defendants in the same cross-examination of Sturm and is set out at page 617. This letter briefly states the financial stringency then existing in New York and the impossibility of raising money for a new enterprise such as the "Belt Road."

The next genuine letter of those referred to (appellant's No. 331) was that of September 24, 1873, from Schumacher to Sturm. It was produced in the cross-examination of Schumacher, of 1884, and set out by him on page 2986. It encloses a copy of a letter from Placido Vega and a copy of Schumacher's letter to his brother in San Francisco, on the subject of the Vega collection, and asked Sturm's views thereon. The defendants had employed Sturm, it will be recalled, to collect upon commission their Vega draft on Mexico. It speaks in a general way about the claims of the defendants and Sturm against the Mexican government, and says, as to the Nevada mine (in which Schumacher had taken an interest for Sturm), "nothing further has yet resulted" and therefore, "nothing has been done with your subscription." It also speaks generally of the financial crises and laments that the insurance companies do not pay. It does not support any of the positions to which it is cited by appellant.

The next genuine letter referred to (appellant's No. 347) is that of October 26, 1873, from Sturm to Schumacher, set out in the same cross-examination of Sturm (p. 617). Mr. Schumacher (p. 2861, q. 417) says that he received it. It answered the "Belt Road" letter of Schumacher, of October 22. In it, Sturm laments the hard times and his own personal financial embarrassment. In it Sturm detailed the affairs of a lumber seasoning enterprise in which he was then engaged. In that connection, he speaks of having borrowed in bank $5,300, which, it was promised, could be renewed till spring, but which he finds he must pay, and as to which, he says:

"That puts me in a terrible hole, and I can see no way out *except I can borrow money somewhere.* Since a fortnight, I thought whether I should not visit you and ask your advice, but could not, and can not now, leave here. Besides, *I relied on my own ability to pull through alone and thought it wrong to trouble Funke and you, who have both done so much for me with my affairs,* at a time when I must expect (as your letter of yesterday affirms) that you would have your own troubles. After sleepless nights, however, I have come to the conclusion that it can not he helped, for in the first place it is my duty always to tell you the plain truth about my position, and secondly, it might be possible that you have a way out."

He then recites the daily profit of the lumber seasoning business as from $85 to $110, and his need of cash for the weekly pay-roll therein, of $155, and cash to meet the $5,300 of notes, and his inability to raise money. He then says:

"Now your life insurance companies are loaning here in the West on long terms against good security, and it may possibly be that one or the other of the *companies in which my life is insured will also loan me something. I can give them the best security—real estate inside the city of Indianapolis, entirely free, and of three or four times the value that I wish to borrow thereon*—and as they sent me yesterday and this morning the enclosed notices to pay my premiums, it would afford an opportunity to find out under

what conditions, if at all, a loan could be had. Do me the favor to find this out, for if it can be done I am out of all trouble. *I should like to take not less than* $12,000 *and up to* $20,000 *for five years.* The regular rate of interest here is 10 per cent. per annum. If that can be done, I can rely on a sure income which will protect me from continual trouble until the Mexican affairs and the insurance claims are settled, which I hope will be done by and by."

"I have *spent* so much money and time in these matters, that it gives me now, at this moment, trouble to get through. If so much money could not be borrowed just now I could get along with $3,500 now, and $600 per month until January or February at farthest. If I can have this for six or eight months from January 1st, I would give also good security for this. Enclosed I send you notices with the request, if it is possible to renew my policies, that would secure at least $2,000 each in case we should wish to cancel them next year, *and secure you in case something should happen to me.* I can not possibly raise any money, and if anything should arise then this at least is saved. I believe you have three policies in all, and of these three companies one ought to have so much money that they can loan me some against such excellent security as I can offer them. As they have to loan out their money anyhow a little money now soon would help me a great deal."

He then speaks of the Mexican claims and of Mr. Thornton's appointment as umpire therein; says that he fears that the "Belt Road" can do nothing at present, but says that he wishes Funke and Schumacher would not give it up, and ends with a hope that they can "raise some money" for him.

This letter is referred to by appellant as supporting the following proposition stated on page 64 of their brief: "About October 25, 1873, Sturm wrote them that the bank was pressing him for about $5,300, and asked them if they could not raise some money ON LIFE INSURANCE POLICIES OF HIS THAT THEY HAD IN THEIR HANDS."

It will be seen from what we have quoted from this letter of Sturm's that he had no intention to borrow money "on life insurance policies," but that he hoped to borrow

from $12,000 to $20,000 on real estate mortgage from one of the companies in which he was insured; that he referred to the policies as a security already held by defendants, and which they were interested in keeping alive, lest "something should happen" to Sturm.

This letter was answered by the next letter referred to by appellant (appellant's No. 351) being that dated Oct. 30, 1873, from Schumacher, set out in Sturm's cross-examination at page 620. It speaks of the money market; of the unreasonableness of the bank pressing Sturm for payment of the $5,300 after promising to renew. We quote the following from that letter:

"The insurance premiums I shall of course pay, particularly as $1,589.05 have arrived from Mexico for your credit, as per enclosed letter of R. Boker. Is your account now entirely square with the above, or have you to claim still more through R. Boker?

"I am very sorry that the situation is so blue. We carry ourselves through, so to say, as even we can not get any money on notes, not at twelve to eighteen per cent! *I will ask the insurance companies about a loan on your City of Indianapolis property*, but do not believe that I can hold out any great hope of success." After some remarks about expected financial legislation in Congress, Schumacher continued: "The Mexican claims would at last be something on which we could base our hope, if only it does not last altogether too long." (The latter part of the last sentence, by a mistake in printing the record below, was thrown into the 23d line of page 619 of this record.)

It will be seen that there is nothing in Sturm's letter of October 26, or in this letter of Schumacher's in reply, supporting any of the propositions to which they are cited by appellant.

The next communication referred to by appellant (appellant's No. 356) is genuine. It was a telegram in the form of a letter by Sturm to Funke, dated Indianapolis,

November 20, 1873. It is set out in Sturm's cross-examination at page 622. In it Sturm says that he has many telegrams and letters calling him to Washington, but that he has not the necessary money. "Can I draw on you at sight for $2,000 and for $500 a week until January?"

The next communication referred to (appellant's No. 357) is Funke's telegraphic reply of the same date, set out on the same page. In it Funke says: "Still unable to discount notes. Can only raise money on government bonds, therefore impossible to comply with your request now, but think things must improve very soon."

Sturm's telegram indicated a necessity for his going to Washington, where he was pressing the arbitration of his own claims and those of the defendants against the Mexican government; the latter upon a stipulated commission of 25 per cent. Sturm evidently thought that Funke's desire to collect his own claim and to have Sturm in Washington in that interest would influence Funke to make the loan requested.

The next letter was by Sturm to defendants, but Sturm had no copy of it and the defendants have mislaid the original. It was dated November 23, 1873. (P. 332, qq. 348–351; p. 2862, qq. 419½–421).

The next letter referred to by appellant (appellant's No. 360) was that of November 26, 1873, by Schumacher. It is set out in Sturm's examination in chief (p. 333.) It states that it is in reply to the letter of the 23d, which has just been received. It expresses sympathy for Sturm in his financial embarrassment. It shows that the money crisis in New York was still flagrant. It is cited by appellant's counsel for the italicized part *only* of this expression: "*If you only could find some friends who have government bonds, on this I could raise money*, on other security it is difficult to get loans. I will, of course, gladly pay the premium on your life policy in the Germanic. I will either go there to pay or you may draw on us for the amount. I hope

and trust that something will turn up there in your favor before December 1. At present I do not see how we can comply with your request for $1,500. To-morrow is Thanksgiving Day and on Friday I will see and will write you again. There seems to be no money at all in your part of the country! I wish that you were here; perhaps things might go better. Naltner and Wood have succeeded in their designs here. Naltner is going to see the boys and Wood leaves for W——, but will be back shortly on some other business. I don't see much chance in Cuban arms business; it is a poor affair. Keep up your courage and don't get excited, things will and must come all right. Write again at once."

The letter referred to as No. 368 was from Schumacher to Sturm, dated January 16, 1874. It is set out on page 334. The letter referred to as No. 372 was also from Schumacher; was dated March 11, 1874, and is set out on page 2165 in Schumacher's testimony of 1881. The letter referred to as No. 373 was from Sturm to Schumacher, and is set out from the original, dated March 16, 1874, in Sturm's cross-examination, at page 814. The letter referred to as No. 374 is from Schumacher to Sturm, dated March 18, 1874, and is set out in Sturm's cross-examination at page 814. These letters of Schumacher's answered letters of Sturm which are not referred to by appellant's counsel.

One of the letters answered and not referred to by appellant was written by Sturm to Funke January 3, 1874. It is set out in Sturm's cross-examination on page 624. We quote the following from it: "Just now I have written a hasty letter to Schumacher and have begged him to advance $300.00 to Colonel Wood." He says that he (Sturm), is urging Parsons to push forward the Baltimore insurance cases, and to avoid being thrown into bankruptcy, he has paid a $1,000 note in bank by selling good notes for $1,500 at a discount of $475.00. Another letter of the same date,

addressed to the defendants by their firm name is set out in Schumacher's testimony of 1884 at page 3087, and reads as follows:

"Gentleman please pay Col. Wood or order, $300 *and charge same to me.* "H. STURM."

"Received the above amount January 5, 1874.
"WM. P. WOOD."

These letters were answered by Schumacher's letter of January 15 (Record p. 334), in which he expresses regret over Sturm's financial distress and urges him to come east to attend to the Baltimore cases. He says that Wood considers Sturm's presence essential and that Parsons, in Sturm's absence, will do nothing. Schumacher's letter of March 11 (Record p. 2165), answers Sturm's letter of March 8, not referred to by appellant, which is set out in Sturms cross-examination, page 633. Sturm's letter of the 8th stated that the Mexican claims "would be decided soon" and that "as a whole, the opinion is greatly in our favor." This is the letter in which Sturm speaks of not having had a night of undisturbed sleep since New Year, etc. Schumacher's letter of March 11, spoke of the expected decision from the Mexican Commission, expressed sympathy for Sturm in his trouble, and mentioned certain steps taken in the insurance cases. Sturm's letter of March 16, 1874, page 814, answered the last letter and enclosed a letter from Parsons, which was evidently a dun, for he says: "I have no money at present, but something should be done with Parsons now. *Could Funke and you, perhaps, attend to this for me?* It will, I hope, soon be better. *In case you can (and I hardly like to ask you for it), I request you to take a receipt from Parsons and to inform me.*" The letter of Schumacher of March 18, answered this (p. 814). It says: "*That Parsons wants money*, we can not blame him for and in order not to put anything in the way of the good cause, *we have complied with your wishes and have sent a check to Parsons for* $500, *for your account, as per enclosed copy of our letter.*"

These are the genuine letters referred to by appellant's counsel by number on page 65 of their brief. We submit that none of them can be tortured into mild requests from a lenient creditor to his debtors for the payment of money owing or to become owing. They are palpably one and all a cry of distress from a man in financial trouble to indulgent friends who are more prosperous.

The other letters referred to, viz., No. 368, Sturm to defendants, September 18, 1873, No. 329, September 21, 1873, and No. 354, November 19, 1873, are, we think, all fabricated. To the same series of letters belongs one dated October 9, 1873, which is set out by Schumacher (p. 2996) from a copy furnished the defendants by Sturm's witness, viz., his son-in-law, Heath, as taken from his (Heath's) firm's letter book—Kimball, Aikman & Co.'s book. The following general remarks apply to all of these, as well as to the other letters claimed by the defendants to be spurious:

1. The receipt of no one of them is acknowledged by letter or otherwise, nor is any letter acknowledged in which the sending of any of these was mentioned.

2. A number of these refer to others of the same character, and in doing so numerous genuine letters intervening are ignored.

3. No letter was ever received complaining that any of these letters remained unanswered, although the record shows that uniformly the correspondence was by letter and prompt answer.

4. Several of these letters are found in Kimball, Aikman & Co.'s letter-book, a firm in which Sturm was not a member, and they seem to be scattered through that book without regularity as to date. We believe that no letter produced from this letter-book was ever answered by the defendants.

On page 621 of the record, Sturm purports to set out a list of letters written by him to the defendants in 1873. In that list a letter of September 18, 1873 is mentioned, but

no reference is made to letters of September 21, October 9 or November 19, 1873. On pages 331–332 of the record, speaking of this letter of September 18, 1873, in answer to question 340½, Sturm says: "I took an impression copy but I can not read it. I can not make it out, not even the date. I have got the impression, but can not read it." (For more to the same effect see p. 341.) On page 621 he said, referring to this list of letters: "I have already referred to and identified some of the letters in each of these lists in my examination in chief, *but I have no impression copies of my letters of* 1873, and I ask that the defendants produce these letters; and there may be other letters and telegrams that I can not now find or call to mind, both written and received."

Although when examined he could not read his copy of this letter of September 18, 1873, even its date, yet a year or two later, when the defendants at Schumacher's examination in New York asked appellant's counsel to inform the defendants of its general nature, the following response was made. (P. 2927.)

JUDGE CLAYPOOL:

"I don't exactly know what letter General Sturm referred to in his answer to question 340 of his direct examination, but I have now in my possession a memorandum and abstract of letters, and have before me an abstract of one dated September 18, 1873, which, so far as I have it, is as follows: The letter of Sturm to Funke says:

"'He can buy the Allen and Latson judgment cheap, so it may not fall in Cleveland's hands, which is important for both of us. I have so far advanced all the insurance expenses and taken so much of my private funds (for instance, yesterday, again, $100 for Bridgeford) that I am now without cash money, and can not make further advances for the insurance, and am compelled to beg you to help me out momentarily with a private loan of say $3,000, for which I will send you my notes. As Rabing has charged the $12,000 about, for which I gave you, in October, 1871, the Mexican securities, all to my bank account, these are now pretty well paid with the money

that has come in since June 1, and our money affairs, except the suits, are square. If you can procure this money for me you can keep the securities further, with my notes, and I would like to keep all such matters separate from the insurance affairs.' "

Schumacher says this letter was not received (p. 2928, q. 854), which is corroborated by Rabing on pages 3207, 3208, of the record, where he shows that he never heard of such a letter, and that after diligent search by him and the defendants it can not be found.

How Sturm furnished his counsel with this "abstract" of this letter was never explained in the evidence. The appellant was content to leave it just as we have left it above.

The next letter of this series was that of September 21, 1873, from Sturm to Funke, and is found in Kimball, Aikman & Co.'s letter-book, at page 500 thereof. It was produced by Heath in his deposition taken at Denver in 1883, but was there not set out, being merely identified (p. 1256, q. 62). Heath does not claim, and we believe no one ever testified, that any one of the letters found in this letter-book were really mailed or sent to the defendants. Heath in answer to question 60 (p. 1256) in which he was asked to identify the book, and to give the dates, etc., of the letters, said: "Yes sir, I have copied several letters written to (by) General Sturm in the copy-book of Kimball, Aikman & Co. at different times, and this is the book (plaintiff's counsel hands witness a letter-book). This is the letter-book, and is the letter-book of Kimball, Aikman & Co." On page 1258 he adds: "All of the foregoing letters are signed by H. Sturm and are in his handwriting." On pages 2288, 2289 Mr. Funke says that this letter was not received. In this he is corroborated by Rabing (p. 3207) and Schumacher (pp. 2985, 2986). It is set out by Mr. Schumacher, at defendants' request, from a copy furnished to defendants by Heath at Denver

(p. 2985). It is very like the letter of September 18, 1873, in setting forth Sturm's present theory, viz., that he was only temporarily advancing the insurance expenses.

The first sentence of the letter is as follows: "*Just now my son-in-law brings me a telegram in reply to my letter of Thursday.*"

The letter of October 9, 1873, was addressed to Schumacher, was identified by Heath as being found at page 1 of the same letter-book on page 500 of which the letter of September 21, 1873, was found. Heath did not set it out, and his testimony as to it was exactly the same as that quoted touching the other letter.

Mr. Schumacher, answering through Rabing, said that the letter had never been received (p. 2996). It was set out by the defendants in Schumacher's deposition of 1884, from a copy furnished by Heath at Denver (p. 2996).

It is largely a repetition of the letters of September 18th and 21st, and complains that the letter of September 21st has not been answered.

THE KEY TO THIS SERIES OF "LETTERS."

In the letter of September 21, 1873, Sturm says to Funke: "*Just now my son-in-law brings me a telegram in reply to my letter of Thursday.*" The "Thursday" last before September 21, 1873, was September 18, 1873; therefore it follows that the letters of September 18 and 21 and October 9, 1873, all revolve around a supposed telegram from Funke, received September 21, 1873. IF THERE WAS NO SUCH TELEGRAM THIS CORRESPONDENCE CAN NOT BE GENUINE.

On cross-examination Sturm disclosed the fact that he had no such telegram; *that he had a telegram from Funke, the date of which was obscure, but which bore upon its back an endorsement by his son-in-law, Heath, as follows:* "SEPTEMBER 20, 1873." It transpired that this was Funke's telegram of NOVEMBER 20, 1873, and answered a genuine

telegram of Sturm's of the same date. We quote Sturm's evidence, which shows, we think, that the correspondence referred to was "made up" from this telegram and its erroneous endorsement.

STURM IN CHIEF IN 1882. (P. 331).

BY MR. HORD—

Q. 337. "When was it you became 'busted?' What time in 1873?

A. "Oh, well, it was during the summer of 1873. *Previous to September* 20, 1873, *when I got that telegram from Mr. Funke,* and about the time that Mr. Schumacher wrote me about going into the Shelburn mine. I wrote to him then that I had no money; that I did not want to sell my land to go into a speculation, and I had no money to go into it."

BY JUDGE CLAYPOOL, RESUMING—

Q. 338. "Is the letter Mr. Schumacher wrote to you about the Shelburn mining stock one of the letters which has been identified by the reporter?

A. "Mr Schumacher made me a proposition to go into this mining business and to get some friends of mine to go in, under date of July 23, 1873, as shown by a letter of that date. I replied under the date of the 31st of July, I believe, declining to go into the speculation. He acknowledges the receipt of that letter August the 5th, in a letter which has been identified.

Q. 339. "Have you the letter that you wrote?

A. "The letter that I wrote I have not got. I have an impression copy of it, but I can not read it. In that letter of August 5th he writes to me that he has nevertheless interested me to the extent of five thousand dollars in this silver mine, and that he will look out for the money. Afterwards I wrote to him that I needed money, that I was hard up here, and that I would like to borrow some money."

BY MR. HORD—

Q. 340. "At what date did you write back to him?

A. "*That I can not say exactly, except that it was previous to September 20th. I suppose it was September 18th.* It may have been September 17th. I asked him to discount some paper for me and to help me out in New York."

BY JUDGE CLAYPOOL, RESUMING—

Q. 340½. "Have you a copy of that letter?

A. "*I took an impression copy, but I can not read it, I can not make it out, not even the date. I have got the impression, but I can not read it.*"

FROM STURM'S CROSS-EXAMINATION (PP. 614–615).

Cross-question 1665. "You have said, in answer to question 334 of your evidence-in-chief in this case, that you were 'busted financially' in 1873, and you said, also, in answer to question 337, that this was in the summer of 1873; when was it in the summer of 1873 that you became insolvent?

Answer. "I did not say insolvent. I did not have any ready money except by borrowing. I obtained some.

X. Q. 1666. "What time was it in 1873 that you were 'busted financially?'

A. "It was about the time the panic occurred, whenever that was. I think it was in September.

X. Q. 1667. "*Have you the dispatch referred to in answer to question* 337 *of your examination-in-chief?*

A. "*Yes, sir; I have that dispatch.*

X. Q. 1668. "Will you produce it?

A. "*I have that dispatch here. It has already been identified by the reporter* (handing the dispatch to Mr. Hord).

X. Q. 1669. "In response to what was that dispatch sent by Mr. Funke?

A. "I suppose in response to a letter that I had written to him requesting him to obtain some money for me.

X. Q. 1670. "Have you a copy of that letter?

A. "No; I have no press copies of any letters at that time, so far as I can find, and very few for 1869.

X. Q. 1671. "*That was a night dispatch, was it not, and dated September* 20, 1873?

A. "*Yes, sir.*

X. Q. 1672. "*And received by you on the* 21*st day of September,* 1873?

A. "Yes, sir; that would be the proper time for me to receive it.

X. Q. 1673. "Will you exhibit a copy of that dispatch and make it a part of your cross-examination?

A. "Yes, sir; I will. *The dispatch is dated New York; was sent out on the 20th and received on the 21st, and is as follows:*

"*To Gen'l H. Sturm, Indianapolis, Ind.:*

"Still unable to discount notes—can only raise money on government bonds, therefore impossible to comply with request now, but think things must improve very soon.

"(Signed) FUNKE."

X. Q. 1674. "I understand you to say that you were 'busted financially' prior to September 20th, when you received this dispatch?

A. "Yes, sir; just about that time; just a few days before that the panic had occurred and I could not get any money."

FROM THE SAME. (Pp. 622, 623).

Cross-question 1683. "Did you send the telegram I now show you (handing witness a telegram)?

Answer. "Well, the dispatch that you show me is scratched so——

X. Q. 1684. (Interrupting.) "Just read it.

A. "It is scratched, but is supposed to read as follows:

"'INDIANAPOLIS, IND.,——20th.

"'To H. Funke, care H. Boker & Co.,

"'101 Duane street, N. Y.'

X. Q. 1685. "Does it not say 'November 20th'?

A. "It says, 'Received at 145 Broadway, November 20th, 1873.' That is where the 'November' comes in. The dispatch is a follows:

"'MY DEAR FUNKE—I am pressed hard by letters and telegrams from good parties to come to Washington, but am in a fix here financially. Can I draw on you at sight for two thousand dollars, and for five hundred dollars a week until January? I will go if I can do business, but not otherwise, and can ascertain in two weeks if anything can be done. Telegraph answer to question and write me by mail your views.

"'(Signed) H. STURM.'"

"Now, the words said to be 'two' and 'and' in said dispatch are so scratched that I can not read them, or say what thay are; but I admit that I wrote a dispatch of that

character, but I can not state correctly the amounts stated in the dispatch, for the reason mentioned.

X. Q. 1638. "What business at Washington is referred to in that dispatch?

A. "Mexican claims.

X. Q. 1687. "I now ask you whether Mr. Funke did not, on November 20th, 1873, upon the receipt of the dispatch which you have just read, telegraph you at Indianapolis, as follows:

"'*To Gen'l H. Sturm, Indianapolis, Ind.:*

"'Still unable to discount notes—can only raise money on Government bonds, therefore impossible to comply with request now, but think things must improve very soon.

"'(Signed.) FUNKE.'"

"Did you receive such a dispatch as that?

A. "I received such a dispatch, but my impression is it was dated September 20th and not November 20th. It is possible that this dispatch is the one that came in answer to that, but *my impression has always been that it was dated September* 20, 1873.

X. Q. 1688. "What was there at September 20, 1873, that would have called for this dispatch at that date?

A. "I know nothing further except that I had written Mr. Schumacher for a loan; that is all I know.

X. Q. 1689. "Do you think that it was in answer to the dispatch of November 20th?

A. *It is my impression that the dispatch, which I believe to be dated September 20th, is really the answer to this dispatch of November 20th. The dispatch received has no date on the face of it except 'twentieth.' On the back is endorsed 'September* 20, 1873,' *in the handwriting of my son-in-law, Mr. Heath.* I recollect nothing further about it except that I believe the endorsement by my son-in-law is a mistake, and my best impression is that it was sent in answer to the dispatch of November 20, 1873, although about this I may be mistaken.

X. Q. 1690. "Whether that is the dispatch or not, you think there was a dispatch that came to you in answer to your dispatch to Mr. Funke of November 20, 1873, of a similar character?

A. "Yes sir; I received a dispatch in reply to my telegram to Mr. Funke. *I have no doubt about it, but I*

have not got it unless the one that I have been shown a copy of—the impression copy of (the telegram sent by Mr. Funke to me)—is the one, and I now believe that the telegram just before referred to as under date of September 20, 1873, *ought to be dated November* 20, *and that it was sent to me in reply to my telegram of the* 20*th of November.*"

Sturm had before given lists of all letters and telegrams between him and defendants in 1873 (pp. 328, 621). In these lists he claims to have received a telegram from Funke, of September 20, 1873, but he does not mention the one from him to Funke of November 20, nor Funke's reply of same date. At page 328 he said he had then in his hand the letters and telegrams from defendants mentioned in ~~their~~ list, including one from Funke of September 20, 1873. That telegram we have shown he admitted was received November 20, 1873. He had no copy of his own message of that date, but when defendants produced it he admitted sending it (p. 622).

He was willing to leave this series of "letters" without explanation in just the condition his testimony on page 622 left them, and we do the same. There was no explanation ventured in the argument in the Circuit Court and appellant's counsel in their brief here have offered none. All of these remarks apply to the alleged letter of November 19, 1873, set out at page 3001. When it is read in connection with the genuine telegrams of the parties of November 20, above referred to, it will be seen that the "letter" of the 19th does not articulate with them, but it does accord with the others in this series of alleged "letters."

STURM'S REAL ESTATE MORTGAGE TO DEFENDANTS.

On page 65 of appellant's brief, his counsel say:

"Finally Sturm had an interview with H. Boker & Co., December 2–4, 1874, of which he made a memorandum (No. 388). During that interview it was *proposed that Sturm execute some mortgages on some of his real estate. This Sturm declined to do, but Sturm did agree with Funke*

that he would convey some lots to the latter absolutely, and afterwards did so. These lots were afterwards conveyed by Funke to a man by the name of Martindale, and Martindale executed notes secured by mortgages on these lots, payable to Funke."

The Circuit Judge, in his opinion, said on this subject: (p. 101.)

"Then another circumstance to be remembered: General Sturm executed to H. B. & Co., or to one of the firm, perhaps, a deed conveying certain lots in the city of Indianapolis, for an expressed consideration. General Sturm swore that H. B. & Co., agreed to take the lots at the consideration expressed, and that the deed was an absolute conveyance. The evidence, I think, abundantly shows that that was not true; the deed was simply a conveyance in trust by way of security or mortgage. I think it is very plain that General Sturm knew when he thus testified that his statement was not true."

The District Judge, on page 116, said:

"I wish to say that I concur with the Circuit Judge in respect to the question as to whether the conveyance of real estate was a mortgage or a deed. It was a deed absolute on the face of it, but it was, in fact and in law, a mortgage."

Mr. Schumacher (pp. 2864, 2865) testified that in December, 1874, defendants, in an interview at New York, as they had often done before, reminded Sturm that he was owing them for money advanced, and at that time asked for security for it which defendants could use as collateral in bank, and that Sturm afterwards secured them with the Indianapolis lots. Having examined Sturm's memoranda of these December (1874) interviews Schumacher said such talks were not had. "I have no recollection whatever of them. If General Sturm had told us so and made such a demand he would not have got a single cent. He would certainly have been shut out entirely. These memoranda were made up afterwards. They are made up for this purpose and for this suit. That is my belief." (Also p. 2180.)

Schumacher says Sturm in these interviews made "*no demands for a settlement; he begged.*" (P. 2866.)

Mr. Funke (p. 2224) says that on several occasions he spoke to Sturm about his indebtedness to H. B. & Co. "When he transferred his property in that lot transaction that was one of the occasions we took to tell him about his indebtedness. Then another occasion was when he got his life insured. That was to satisfy my house and the office to some extent. Finally he transferred the policies as collateral on account of his large indebtedness."

Funke (pp. 2224, 2225) further says that on the occasion of the December (1874) interviews Sturm's indebtedness to defendants was discussed, and Sturm said "that he would do all he could to satisfy that indebtedness, and would transfer some lots, and afterwards that was arranged in the office in some way" between Sturm and Boker and Schumacher. He further says, in answer to question 447 (p. 2227), that Sturm said he "*would send us a mortgage for some of the lots.* * * * He went home, but he did not send us the mortgage, and said that it would be better to deed the land out and out in my name. That was done, but no money could be raised in that way. * * * Nothing was said about purchasing" the lots. He says they did not purchase them, but took them with the understanding that they were "a collateral proposed by him (Sturm) as a mortgage. Afterwards he (Sturm) said he thought best to make a deed of that land; that was his position." (See Funke's testimony continued on the same subject on pages 2227, *et seq.*)

The record shows, and it is not disputed, that Mr. Funke had charge of the stock, Mr. Schumacher looked after the office and correspondence and Mr. Boker attended to the finances of the defendant firm.

Mr. Boker speaks of this transaction in Indianapolis lots on page 2100. We quote from his testimony on that page:

Question 30. "What, if any, real estate transactions has the firm of Herman Boker & Co. had with Herman Sturm, and when?

Answer. "He gave us some real estate as collateral security.

Q. 31. "In what year?

A. "1874.

Q. 32. "How did he happen to give you that real estate as collateral security?

A. "In looking over our books I found that General Sturm was indebted very heavily to our firm, and I told Mr. Schumacher that I wanted some security for General Sturm's indebtedness. Schumacher told me he would speak to him. Then, some time afterwards—how soon afterwards I can not tell exactly—General Sturm came to me at our store and told me he would give me all the real estate I wanted as security, and I accepted it. Then, in December, 1874, he sent us a deed for, I think, six lots in the name of Hermann Funke, as collateral security for the debt he owed us, advances, etc., and general account.

Q. 33. "Where were the six lots situated?

A. "Indianapolis.

Q. 34. "What conversation, except that you have detailed, had you with General Sturm upon the subject before that deed came?

A. "No other conversation at all.

Q. 35. "In the conversation between General Sturm and yourself, what number of lots did he say he would give you as collateral security?

A. "He did not mention the number of the lots. He told me he would give me all the real estate I wanted as security.

Q. 36. "Who determined the number of lots as collateral security?

A. "He did.

Q. 37. "Who determined what particular lots should be conveyed as collateral security.

A. "He did.

Q. 38. "Prior to the sending of the deed by General Sturm to the firm of Hermann Boker & Co., what did you know about General Sturm's real estate at Indianapolis?

A. "Nothing.

Q. 39. "When have you been to Indianapolis prior to that time?

A. "I never stopped there any time prior to that time. I may have stopped in going through on my trip to New Orleans or Galveston.

Q. 40. "What did you know about the value of the six lots at the time the deed came?

A. "Nothing at all.

Q. 41. "What plat of real estate was at any time shown you by General Sturm prior to the time the deed came?

A. "He never showed me any.

Q. 42. "State whether you did or did not prior to that time ever see a plat of General Sturm's real estate at Indianapolis.

A. "I never saw one.

Q. 43. "When did you first see a plat of the real estate?

A. "In September, 1875.

Q. 44. "State whether or not a plat did or did not come in the deed when it was sent to you?

A. "I never saw one.

Q. 45. "State what appraisement of the real estate you saw until that deed came.

A. "I never saw one until the deed came."

See his further testimony on the same subject. (Pp. 2101–2124.)

STURM'S TESTIMONY on this subject is found on pages 209–218; 337–347; 764–798. We quote some of his language:

"I made a direct sale of these lots to H. B. & Co., for the sum first stated—$24,000." (P. 210, q. 256.) Asked with what member he "negotiated that sale," he replied: "With Ferdinand Boker." (q. 257.) In answer to question 272 (p. 211), as to what became of the lots, he says they were "sold at the request of Mr. Boker to William Martindale."

He says, on pages 337–338, that in the December, 1874, interviews he was reminding defendants that he (Sturm) "*had advanced*" so much money to the insurance expenses, and therefore was out of money, and therefore asked them to raise him some money in New York. He says, on page 339, that he told defendants that his money was invested

in the insurance cases, and "*that I had promised them that I would let it stand with them;*" that he and defendants had "some figuring," showing that on a settlement defendants would owe Sturm, and that Funke said: "Sturm, we know all that, but that is in the business, you can not get that out. Schumacher and I are all right, but Mr. Boker is unwilling to take any money out of the business now." Sturm said (q. 380): "*I have forgotten the figures, but I showed that if we settled right then and there, they were considerably in my debt.*" (P. 339.) In answer to question 384 (p. 340), he says Boker took the subject up with him in those interviews, and "asked me if I could not give them some mortgage notes, and such like, *and they would try to have them discounted for me, or sell them for me.* I had a talk then with Funke, but I had seen Boker and it struck me that that thing might be done, but when I saw Funke again, I says: "Now, see here, Funke, we have had one arrangement about this Mexican business. You promised to advance me my money if I wanted it, and you promised to pay a portion of the expenses. Now, I will give you a deed for six lots. I do not want to give any mortgage notes or anything like that. I will give you a deed, but I will not give it to the firm. I want it to be a separate matter entirely. And Boker said that was all right enough; he did not care, and that would be satisfactory, just so they had something to get the money on. I told him, all right, I will give Funke a deed. We will make that a separate matter entirely. *I will sell him the lots out and out*, and you can do with them what you please, then, which Mr. Boker afterwards agreed to, and then I went home to Indianapolis, and a day or two afterwards I made out the deed for those lots and sent it to him. *The deed was made to Hermann Funke, just as I said I would deed them.*" (P. 340.)

This was Sturm's testimony in chief.

In cross-examination (pp. 764, *et seq.*), Sturm goes over the matter in more detail. Amongst other things he added this as to what was said in these interviews. (P. 766.) "The consideration was $24,000. I can not find the deed just now. During the conversation I told Mr. Boker and Mr. Funke very distinctly, but Mr. Funke more particularly, that there was a mortgage on each lot of $800; that if I deeded this property to him it would be at the rate of $100 a foot, and that I would not be responsible for anything thereafter; that I would make the deed subject to the payment of this mortgage, and that the amount of $600 on each lot I intended to deduct from the purchase price or consideration, which was to be $4,000 a lot, which makes $24,000, and deducting $600 for each lot made a deduction of $3,600. I did that because I did not want to be responsible for anything afterwards. I would not have any liability under the deeds. That was all agreed to, and no objection was made, and I had such a deed made out in that way and sent it to Mr. Funke." (P. 766.) There is much more on this subject in his cross-examination, but we shall not quote it, having cited the pages above.

STURM'S MEMORANDA OF DECEMBER 2–4, 1874.

Sturm produced a series of "memoranda," which he says were made during these days, December 2 to 4, 1874, of what transpired in these interviews. They are set out in his examination in chief. (Pp. 341–347). We quote them from his testimony:

Q. 386. "I will ask you to look at your diary for 1874, and to the dates of December 2d, 3d and 4th, and state whether or not those memoranda were made at the time they purport to be, and whether they are in your handwriting or not.

A. "All these memoranda were made at Taylor's hotel, and each one was made on the day that it purports to have been made.

Q. 387. "I will ask you to read them over and state, from your recollection, whether or not they recite correctly

or otherwise the substance of your interviews upon these occasions.

A. "Yes, sir; they do. That is what I made them for. I was in the habit of making such memoranda.

Q. 388. "Please read the entries under the dates of December 2d, 3d and 4th, 1874, and state from your recollection whether or not they recite correctly or otherwise the substance of your interviews upon those occasions.

A. (After reading the memoranda referred to). "Yes, sir; they do."

JUDGE CLAYPOOL:—I will introduce the entries in the diary for those three days in evidence. They read as follows:

December 2, 1874. "Had a long conference with Schumacher & Funke. I explained to them in a short and concise way my necessities and that I must have money for personal purposes; showed them the large amounts advanced by me for the Mexican business and invested in the insurance suits. I also told them I had used the greater part of the money drawn by me from them lately in insurance expenses. On looking over the cash account I have overdrawn the cash account nearly, but not quite $4,000, exclusive of the premium on my life insurance policies, which amounts to about $1,825, making a total of $5,825 nearly. I then showed them (Schumacher & Funcke), that since the motion trials commenced in 1872, I have drawn more than this amount from my Indianapolis bank account to pay insurance expenses, and that I never contemplated to draw money from that source for this business, and that now Boker's turn has come to advance and put in money, particularly as they have already received a large return on their policies. Funke and Schumacher both admit this, and say they will arrange this matter for me, but say they are so cramped for want of money they can not spare it now.

"They regard the money paid by me *invested* in the joint account *with them. That they intend and always have intended to and they would* advance all needed money for the suits as agreed, but that F. A. Boker will not advance any money for personal purposes, or loan any money. Subsequent to this talk Funke took me to Holtz's restaurant next door, where I told him plainly and short that I can not stand this; that Boker has a wrong view of the matter, and he, Funke, ought to explain this matter to Boker right away; that they are largely in my debt, on a settlement of the account now, even if we drop all the suits now right here. Funke then said to me: 'My dear Sturm, we know all that, and Boker knows it, too, but we are so tied up that Boker is afraid and does not want to give out any money for anything not absolutely necessary. But we must arrange this for you, and I will talk to him. Why did you not arrange it in a different way, so that Boker would not have known anything about your drawing or wanting to draw for personal purposes, that is what he objects to; if you had asked for a thousand dollars now and then for expenses you would have had it. If you only had some

bonds, or something we could use here as collaterals, I would arrange it myself.' I then told Funke that I was fixing up my lots, streets, etc., and that I wanted this money for that purpose, and that I hated to sell my lots now. I told him how the lots were appraised; that I had sold at auction for $49 to $50 per foot front, and had stopped the sale, as that was too low for me. I then showed him the appraisement, which I had with me, and that they were valued at $100 per foot front and over, and that my improvements would make them more valuable, and I have offered him some of the lots as security for a loan. We returned to the store and had a further talk with Schumacher, and I explained to them on the large map (which Schumacher has from me) of Indianapolis, where my lots are situated, adjoining the U. S. *Arsenal and Woodruff Park*, also the particulars of the streets, etc., on the plat which I have with me. They both promise to see Boker and arrange some way by to-morrow, if possible. H. STURM."

"December 3, 1874. I have seen Funke, Schumacher and Boker to-day, and had a special conference with Boker, and have gone over the same grounds with him as with Funke, and Boker says they must do it in some way and raise some money for me, and if I will give them a mortgage on some lots of mine, he will raise $15 to $20,000 for me, or let me have it some way. I have told him that I do not need the money all at once, but must have that much any way. I have also talked the matter over again with Funke, and have told him that this is to be a special matter, and I don't want to mix this up with our other business of the joint account. I have told him that the Mexican bonds and coupons which I let him have in 1871 are still in their hands, although all that money has been repaid to them, or rather, they have charged it up in my cash account, when, in reality, that money was advanced on the Mexican business, as understood at that time, and has nothing to do with our joint account at all. I have proposed to him that I will deed and make over to him personally, as H. Funke, say six lots, situated right opposite to the new house now building for my wife, on Stnrm avenue, but that I will not deed them to the firm, so as to keep this matter an entire different transaction. Funke seems very agreeable, and says he is satisfied and will get Boker all right. He thinks he can use the lots as security for a loan now and then if necessary."

"December 4, 1874. This morning I called on F. A. Boker particularly, and told him that I have thought over the whole matter, but that I do not wish to give a mortgage to the firm, that I wish this transaction to be a separate and distinct affair, not to be mixed up with our joint account or suits, but in connection with the Mexican business, which I have with them. I will deed to Funke out and out six lots on Sturm avenue as above stated. If they want to sell or exchange the lots for something else they might do it right off without bother or trouble as their own property. I have advanced all the expenses in the Mexican business so far though they still have the bonds and coupons which I gave Funke in 1871 and in reality they are in my debt considerable. All this is agreeable to him and approved and he promises that I shall have the money asked for personal purposes. I have promised to send him deed soon after returning home. "H. STURM."

"December 4, 1874. At noon called on Mr. Parsons. There is nothing to be done at present. It is possible that a compromise may be spoken of again as the Atlantic case is pretty sure to be confirmed. Parsons does not feel quite so sure about Orient and New York as the questions of valuation and others was considered and ruled upon different by Freedman and the Atlantic was tried by Monnell and much closer. He says I can be of no use here now but will telegraph me or write when he needs me. This afternoon I signed a receipt for $1,000, cash paid by H. Boker & Co. for sundry expenses, dated December 2. Schumacher paid Naltner March 24, $50; Bridgeford December 2, $150; Harris, December 2, $145, and Harris, December 2, $75; Southard, November 30, for Harris, $45. Bridgeford, to November 30, $130. Lochner, Decbr. 2nd $160. Leissen, Decbr. 2nd $122. Naltner and Wood $100. Petty cash at Holtz, and for sundries for myself $23.00. Total $1,000.00. All for insurance Expenses to Decbr. 2nd. I had another long talk with Funke, detailing to him what Parsons says about settlement, etc., and I requested Funke to have a better understanding with Boker about the true situation of matters, and, if possible, to let us settle up our accounts to date. I told him I must have money as requested *for myself*, though Boker has promised it, he does not seem to appreciate my position —that I have put all the money in the suits, and he ought to be more liberal now, and return me at least my proportion. Funke says that he will make that all right, but the fact is they need money so badly in their business, that Boker is afraid of giving out any more now, but after January or so everything will be better. They have to borrow money, and they want something like government bonds or mortgage notes to use as collateral. The Mexican bonds and coupons they can not use, and the other monies are tied up, but he (Funke) has a great deal to do with lots in College Point, and if I will help them out they will help me out too, *at the same time*. He wishes me to send him an appraisment of the lots by good men, well known in Indianapolis; to send him copy of appraisement of the lots to Phoenix Life Insurance Company. Perhaps he can make a trade out and out for the lots, but they can use them as security in connection with their own notes, and every dollar I put in is that much more in my favor, until the suits are settled or times a little better, when we will have a settlement. He thinks that as the interest on the policies amount to more now than our expenses this year have been, the companies will soon get tired out and pay up, when all our trouble will be over and we can settle in full everything, and if the Mexican business should turn out all right, too soon, we will have spent all this time for nothing."

The Witness. "And I want to say here that when, awhile ago, I spoke, I said, in answer to a question, that I had not given these lots as security. Now, what I want to be understood as saying is simply this, I did not give them these lots as any security for any debt. I gave these lots to Mr. Funke for him to use as security or as collateral, as

they call it—that is the term they use—but I did not owe them anything. I showed them through all these conversations how much they were indebted to me when we could have a settlement, to all of which they agreed to at that time."

STURM'S LETTER OF DECEMBER 8, 1874.

Sturm's letter, sending the deed for the six lots was addressed to Schumacher, and was dated December 8, 1874, and was therefore written as soon as he returned to Indianapolis. *He had no copy of it*, and did not know its contents when he produced his memoranda and testified as we have quoted. (P. 796, X. Q. 2993.) This letter was produced by the defendants in Sturm's cross-examination, and is set out at page 796. It corroborates defendants and contradicts Sturm and his memoranda "written at the time," at every important point.

The letter and Sturm's accompanying testimony are as follows:

Cross-question 2993. "Now, have you a copy of a letter, in German, written by you to Mr. Schumacher on the 8th day of December, 1874?

Answer. "I can find no copy.

X. Q. 2994. "You have no press copy of any such letter?

A. "Not that I can find. My letters were copied in different letter books, wherever I had an opportunity to copy them, but I can not find any such letter just now.

X. Q. 2995. "I submit for your inspection a letter, in German, dated Indianapolis, December 8, 1874, purporting to have been written by you to Mr. Schumacher (handing witness the letter). Look at it, and, if it was written by you, make a translation of it a part of your answer to this question.

A. "Yes, sir; I wrote that letter, and the following is a correct translation of it:

"'INDIANAPOLIS, December 8, 1874.

"'DEAR SCHUMACHER: I sent to-day to Mr. Funke a statement of Mr. Bradshaw (one of our oldest and best

known citizens), from which you can see how high my land was appraised before it was improved, or before it was in the present state.

"'The money which I borrowed at the time (as I already told you, about $500 or $600 on each lot), I have for the greatest part employed to open streets, construct sewers, and make other improvements, and therefore the land has lost nothing by it.

"'To-day I send you a deed for six lots which, as you will see from the map, are right opposite my house on the great *Sturm Avenue*, 120 feet wide. At present there exists no street like this here, although Woodruff Park, opposite to me, has been laid out similarly, but not on such a scale.

"'I have given you purposely from the best lots, and in the deed I have only given the value which these lots had before the avenue was finished as far as it is now, *i. e.*, $100 per foot front.

"'You have now a deed direct and no mortgage, and *in case I do not redeem the matter, or something should happen to me, you will be able to realize the full amount without litigation or any trouble whatever.*

"'We are friends, and as long as we live we will get along well enough, but I wish to arrange matters so that in case certain matters should turn out different from what we expect, you shall have no further trouble, and my wife is of the same opinion and is satisfied with it.

"'*I had the first deed made out yesterday in the name of H. B. & Co.*, but learn this morning that in this case you would have many difficulties to sell the lots, *in case it should ever be necessary*, and the same difficulties will arise *if you would transfer the lots back to me. I therefore have the deed made in the name of Hermann Funke.*

"'If all this is satisfactory to you, you can send the deed either to me or to somebody else here, in order to have it recorded. According to our laws you have 90 days from this date to do so. During that time we will see each other again, and I shall not sell these lots to anybody else.

"'In the other letter I write about different matters.

"'In haste, with regards, Yours,

"'H. STURM.'"

The italics are ours. The letter shows that he did not,

while in New York, refuse to mortgage and offer to sell and convey by deed; that he did not while there refuse to *mortgage to defendant firm* and consent to deed to Funke, individually, as a *separate matter;* that no "price" was there agreed upon. But it is needless to comment. The letter shows, just as the District Judge said, that the transaction was the giving of security by way of mortgage; and as the Circuit Judge said, that Sturm knew, when he testified as he did, that what he said was not true. It shows further that the "memoranda" claimed to have been made at the time are really fabrications.

We shall not stop to discuss in detail Sturm's "LETTER" OF DECEMBER 20, 1874, to Schumacher, which speaks of this transaction as a "sale." It is enough that it was not received or answered, and that it emanates from the Kimball, Aikman & Co. letter-book. (Pp. 3006, 2289, 3208; Heath, p. 1256.) It and the letter of December 8, 1874, can not both be genuine. It agrees, of course, with Sturm's testimony and his "memoranda."

The "sale" of these lots by Sturm for defendants to Martindale, was, if possible, more of a hoax than Sturm's "sale" of the lots to Funke.

Sturm managed this whole matter. (Sturm's testimony, p. 792, q. 2974; p. 794, q. 2986; p. 212; pp. 807–808, letter of June 1, 1875; p. 809, letter of June 15, 1875; defendants' testimony, pp. 2163–2235; Martindale, 3753.) Sturm employed the "agents" Kappes & Naltner, Sturm's friend Ægideus Naltner, who was to receive 50 per cent. of the insurance collections. Sturm arranged with William Martindale, the "straw buyer," that in consideration of his kindly taking a deed of the Funke lots, and making notes and mortgages for $48,000 on them, he (Sturm) would pay a judgment of about a hundred dollars standing against Martindale at Indianapolis. Martindale did not record his deed; did not think it worth while, as he was acting for Sturm's accommodation merely.

Martindale was without financial means when he made the "purchase" (pp. 3753–3756). Martindale understood Sturm owned and was transferring the property to get notes, which Sturm "*could use as collateral*" (pp. 3756–3757). Sturm fixed the price, $50,400 (p. 3758); Naltner was Sturm's agent (pp. 3760, 2235). Sturm told Martindale that he (Sturm) would "protect" the notes so that Martindale should not suffer, and Martindale agreed to redeed the lots to Sturm when so requested. (P. 3759, q. 84.) Martindale did not consider that he owned the property; did not pay taxes or exercise any act of ownership over it, and considered it Sturm's property after the deed to Martindale was made. (Pp. 3760, 3761.) In 1876 Martindale and his wife, upon request by letter from Sturm, handed Naltner a general power of attorney authorizing Sturm to sell the lots. (P. 3764.)

After this suit was begun Naltner wrote Martindale, who then resided in the State of Ohio, stating that Sturm had begun this suit, and advising Martindale, if the attorneys for the defendants called on him, to "KEEP MUM." Martindale says that the letter is lost. (Pp. 3765–3767.)

Heath and Sturm drafted the papers in the Martindale purchase, as Sturm admits. (P. 3766.)

After H. B. & Co. had, to protect the Martindale notes, paid in interest on the prior morgages and taxes on the lots, over $1,800 (p. 2103), they discovered that the lots were not worth more than the principal of the prior morgage ($600 a lot), and thereupon abandoned the property to the prior mortgagee. (P. 2171.) Nothing was ever paid on the Martindate notes. (P. 2165.) The prior mortgages were foreclosed, and the lots sold to satisfy them. (P. 1269.)

Neither Kappes nor Naltner were called as witnesses to corroborate Sturm. They were living and accessible.

Sturm testified that in the "sale" of the lots to Funke, when he came to fix the consideration, he told the defendants "distinctly that I had sold those lots at about $50.00 a

foot at auction, and I had stopped the sale, and I would not give them up for less than $100 a foot." (Pp. 735, 736, x.-q. 2501.) Sturm says he had in all forty-eight lots. He says he sold two lots to John C. New, but does not know at what price nor how the consideration, if paid, was paid, or whether Mr. New paid off some notes for him. (Pp. 778–779). He says he sold one lot to a Mr. Schweir for $49.50 per foot. He seems to have been in debt to this man for groceries, and the lot was paid for "in groceries." (P. 780).

He says he sold one lot to Dr. Wagner "under peculiar circumstances," and explains that about September 29, 1874, "Mr. Naltner had got into a diffiulty in New York with Mr. Cleveland, about a one thousand dollar bond that was claimed to be a forgery, which, somehow or other, they palmed off on him for the purpose of getting him into trouble, and he telegraphed that he must have a thousand dollars cash. I did not have a thousand dollars to send him and I told Mr. Lehritter to make a trade for us of one of the lots for cash, immediately, and he did so, but I do not know how much he got. All I know is that the lot was sold at a sacrifice, under the circumstances, for the purpose of helping Mr. Naltner out." (Pp. 780, 781.)

He says he sold one lot to Naltner, but received nothing for it: "He rendered services to me for that lot." (P. 781.)

He says he conveyed six lots, on August 11, 1874, to Naltner, who at once transferred them back to Sturm's wife. (P. 782.)

He says he conveyed two lots to his daughter, Mrs. Heath, on August 11, 1874, as "a gift." (P. 782, 783.)

He says he sold a lot "at auction" to his sister, Helen G. Sturm, on September 29, 1874. Being asked "What did she pay you for that?" he answered, "Dollar for dollar, whatever it was. She bought that at auction *without my consent.* I was not there at the time it was done." (P. 783.)

On December 26, 1874, about two weeks after the deed to Funke for the six lots, he made a voluntary conveyance to his son-in-law, Heath, and his brother, Robert C. Sturm, of twenty-three lots, and thereafter he did not have the legal title to any real-estate in Indianapolis. (Pp. 782–784.) He admits that this deed was not recorded until after Heath had visited H. B. & Co. in July, 1876. When asked why the deed was recorded at that particular time, he answers (x-q. 2902, p. 784): "Well, I suppose it was done at that time, because that is the time when Heath —it was the time that I fell out with H. B. & Co., and I suppose he had it done. I do not know anything at all about the transaction." (P. 784.)

We recall no evidence of any other "sale" of one of these lots by Sturm to any one, and from the foregoing, we submit that he misrepresented their value when, as he claims, he told defendants he had "stopped" an auction sale when the lots were selling at $50 a foot, which he considered a sacrifice.

On June 1, 1875 (p. 807), Sturm wrote Schumacher about the lots as follows:

"INDIANAPOLIS, June 1, 1875.

"DEAR SCHUMACHER: Your letter of the 26th to hand, from which I see that you have abandoned the hope for a compromise. I am sorry for it, as it is particularly of great value to me to get rid of this affair. However, if it can not be done it can not be helped. As nothing has been done yet in regard to the Brooklyn trade, I have tried to sell some of my lots, but money is so scarce that it takes time.

"But I have an offer for half a block (6 to 8 lots) if I will take as first payment lumber in place of cash, and will make the other payments due in two and three years, for which I would then receive mortgage notes with 6% (if possible 8%) interest, *as purchase money.*

"This is the best security, and they are more valuable than any other notes. I have asked $200 per foot front, but will hardly be able to get it now, and shall be satisfied with $150, or perhaps even less.

"I have a similar offer for my Illinois land, and hope to be able to do something ere long. Now, I must know at once whether you can use two and three years' notes there as *collateral, for that is my principal aim, although I should wish to sell something for my own account, and even have to, however so much I should like to wait a year longer.*

"Should these notes serve your purpose I will at once do my best, as I think I can use the lumber. I also could get some other property in trade.

"*I would then, in order to save a double transfer, include the six lots, which I have transferred to you,—respectively Mr. Funke*—and as soon as the trade is concluded I will write to you, *so that Mr. Funke can make out the deeds (or deed), instead of to me, direct to the purchaser.*

"This morning two of the gentlemen will go to Illinois to look at the land. Should it be possible to make a trade to my satisfaction, it will not be necessary to sell so many of my lots.

"Please confer with Mr. Funke and Boker, and write to me at once; let me know how you wish to have it arranged. The mortgages and notes I would then send to you; they would also be made out either in name of H. B. & Co. or Mr. Funke, just as you wish. Day before yesterday I also received a letter, in which I am requested to pay $83.25 for expenses, and I shall to-day or to-morrow send the man a draft on you for this amount. I wrote you—as you will perhaps remember—that this amount, and somewhere also about $16 or so had still to be paid, but up to date the man has not troubled me, and day before yesterday was the first time that I heard from him again about the matter.

"Now, if you can use the notes, please telegraph me 'all right,' that I might not perhaps slip up on the trade.

"In haste,

"Yours,

"H. STURM."

"P. S. Should everything be satisfactory (in case it is not, you must let me know distinctly your wishes), and you can use these notes, *would it not be possible to get through you about* $5,000 *from somebody on such notes for myself.* The money will only be used to further improve the respective property. Yours,

"H. STURM."

This letter shows that the deed to Funke was a mortgage to secure Sturm's debt to defendants. Sturm's account of this transaction was not merely a misstatement, it was willfully false, and memoranda alleged by him to have been made at the time abounded in statements materially false. The memoranda, his alleged "diary" entries, of December 2–4, should be laid beside his letter of December 8, 1874, of which he had no copy. The letter convicts Sturm as a witness, and stamps his alleged concurrent writings as spurious.

LETTERS OF FEBRUARY 2, 1875.

Appellant's counsel, in their brief (pp. 67-68), copy a private letter from Schumacher to Sturm, dated Feb. 2, 1875, and Sturm's alleged reply of same date. They say, respecting Schumacher's letter, "This letter was found, together with exhibits 'H' and 'F,' among the papers of Robert Sturm, deceased."

This statement is calculated to mislead. Sturm testified that he found "F" and "H," as will be seen later on, in a tin box, the lock of which he had to break. He did not claim that this letter of Schumacher was "together with 'F' and 'H'" in the box; but that at about the time he claimed to have opened this box, he found one of his own letter-books, which he said had been mislaid "ever since 1876." "I found it (the letter-book), and on page 37 I found an original letter from Frederick Schumacher to me, written in Germany, marked 'private,' and dated New York, February 2, 1875. It is pasted in there, and my reply to this letter is copied in this copy-book." (P. 1312.) He then sets out both letters. (Pp. 1313, 1314.)

Schumacher's letter was kindly in tone, but distinctly charged to Sturm that he was debtor to the defendants about $20,000 on the bank account, and told him plainly his drafts must stop.

Sturm gives a dramatic account of how he received this letter by the hand of his friend Naltner, while he, Sturm,

was in bed sick, at Taylor's Hotel, in Jersey City, and how, in great excitement, he sprang out of bed, and, after discussing the subject with Naltner, wrote and press copied in his room his "letter" of February 2, 1875, to Schumacher, and then sent it to Schumacher by Naltner. He says he had, until he found this letter-book, *forgotten* all about the letter of Schumacher to him. (Pp. 1377-1379.)

The "letter-book" itself was of a peculiar kind. Its pages, from 11 to 36 inclusive, had been cut out. On pages 37 to 40 was the "letter" to Schumacher, dated February 2, 1875, and on the next page (41) was a letter to Governor Morton, dated March 22, 1875. He tried to explain the mutilation of the book, but failed. (P. 1378.)

In this "letter" OF FEBRUARY 2, 1875, Sturm states the Indianapolis lots transaction consistently with his present testimony, his "memoranda" of that transaction and his alleged "letter" of December 20, 1874, but the "letter" is inconsistent with his genuine letter of December 8, 1874, in which he forwarded the deed for the lots. That it is itself a fabrication is shown in the fact that it mentions by date the spurious letter of December 20, 1874, produced by Heath from Kimball, Aikman & Co.'s letter-book, a "letter" which both of the trial judges must have repudiated.

It is apparent that if Sturm's letter of February 2, 1875, had been received by Schumacher the friendly relations of the parties would have then ceased. It is belligerent in the extreme, unlike in character the entire correspondence admitted to be genuine. It squarely demands money from defendants in large amounts, upon the ground that they are debtors. Up to that time he had *begged them for loans.* It is strange that Sturm, while he had been for years searching his records and papers for evidence, should have entirely forgotten such a letter, one in which he charged to Schumacher's face that defendants

owed him. He sued in 1881. He produced this letter at his fourth examination—November, 1883—and had "forgotten" it till he "found" it.

The defendants testified that this letter was not received. Schumacher on page 2928, question 855; Rabing on page 3208.

We have shown that Sturm's letters up to that time begged the defendants for money upon loan, under promises of early repayment. His letters from that date on were of the same character, and unlike his supposed letter of February 2, 1875. For example see his two letters of March 9, 1875, and July 31, 1875 (p. 1884), and his letter of March 29, 1875 (p. 692). Schumacher's letters to Sturm from February 2, 1875, were consistent with Schumacher's letter of that date. We quote from one of them dated May 18, 1875 (p. 2161):

"What has become of your trade in property? You also *promised to procure for us, through a new arrangement with property, mortgages, etc., funds to cover our advances, as it must especially be our aim to get possession of the moneys again, respectively to receive collaterals* which can be used to procure the same, as we can use them very well in our business. Please tell me how this letter stands." He concludes with a request for an early reply.

On May 25, 1875 (p. 805), Sturm replied, and at the conclusion of his letter, after speaking of his wishes as to a compromise in the insurance suits, and a desire that DaCosta should be seen upon the subject, says: "Should nothing be decided within a fortnight (except you wish different), I will have the mortgages made out. With my trade in Brooklyn nothing has been decided yet. Judge McCue and others sent an agent here, who returned to Brooklyn last Tuesday very much satisfied, but up to the present I have heard nothing."

On May 26, 1875 (p. 2161), Schumacher wrote Sturm, saying: "It is a pity that nothing has been done in regard to the trade of property in Brooklyn. I hope it will be

soon. * * * * * We leave it to you how (according to your inclination), you will arrange it with the promised mortgage notes. If the Brooklyn trade is not accomplished (which I think you may find out sure within a fortnight), the notes might be made out. They can always be used as security when contracting a loan. Please write soon."

On June 1, 1875 (Sturm's X.-ex., p. 807), Sturm replied by letter about the proposed sale of lots. (See page 126 of this brief).

On June 5, 1875, H. B. & Co., telegraphed Sturm on the subject of the sale of the lots: "All right! one, two and three years. Get highest interest." (P. 808.)

On June 5, 1875, Schumacher further replied, to Sturm's letter of June 1, 1875, by letter, (p. 355), saying among other things:

"The mortgage notes are all right, as we have telegraphed you to-day, and we think we can make a loan on them. Send us now of them say $35,000, *against which we shall return you the deed formerly given.* We will also try to make a loan for your own individual necessities."

It will be seen from what we have quoted from the undisputed correspondence following February 2, 1875, that what was written by both parties showed that the defendants were claiming, and Sturm was admitting his indebtedness to them; that the defendants were demanding security for Sturm's indebtedness to them, and Sturm was admitting the justness of that demand, and making vigorrous efforts, as he claimed, to furnish the asked for security. Further it will be noticed by an inspection of the account of moneys paid out to Sturm or for him by the defendants, as set out on pages 79 and 80, of the record, being an exhibit filed with the defendants' answer in this cause, that immediately after the receipt by Sturm of Schumacher's letter of February 2, 1875, his drafts upon the defendants became comparatively few in number and for comparatively small amounts. The friendly relations

of the parties continued after February 2d, the same as before, the only change in the situation being that required by Schumacher's letter of February 2, 1875, namely, that Sturm should ask for less money. If there had existed such a radical difference between the defendants and Sturm as to their true relations as Sturm's "letter" to the defendants stated, and that letter had been received by the defendants, it is manifest that there would not have been further friendly intercourse between them or correspondence such as was had.

The foundation for the introduction of the *letter-press copy* of this letter of Sturm's to Schumacher (February 2, 1875), was not laid. Sturm did not claim that he sent it by mail, but said, as the letter states, that he sent it by his own messenger, Mr. Naltner. No one testified that Naltner delivered it. Naltner was living when the evidence was taken, and was aiding Sturm in this case by furnishing him letters, etc., but he was not examined as a witness (p. 1,845). Naltner was a competent witness to prove delivery; he was accessible after Schumacher denied the receipt of the letter, but was not called. There is a presumption of fact that a letter properly addressed and deposited in the United States mails will reach the person addressed in due course. There is no such presumption as to a letter handed to a private messenger of the writer. The copy of this letter, under defendants' reserved objection (p. 1396), was incompetent. We submit however, that in view of what the record affirmatively shows the letter is, at all events, not genuine, but spurious.

ABOUT COMPROMISE OF INSURANCE CASES IN 1875.

Under this heading appellant's counsel, beginning on page 72 of their brief make certain observations as to the CONDUCT OF THE PARTIES bearing upon the question: WHO WAS THE DEBTOR, STURM OR DEFENDANTS? We quote the following from that brief (page 72): "The evidence shows

that before April, 1875, Sturm began to discuss with them other schemes of raising money upon his property, partly for his own use and partly for the use of H. B. & Co., not in payment of a debt of Sturm to them—nothing is said about that—but *to reimburse them for the advances* which they had made in the litigation *until final settlement*, as Sturm had agreed to draw on his bank account for the expenses, and in the end the expenses were to be prorated."

What passed between the parties in 1875 respecting Sturm's efforts to raise money upon his real estate and the purposeof raising it was by letter. These letters we have quoted from or referred to in discussing the tone of the correspondence following Schumacher's letter of February 2, 1875. Nothing is said in those letters about Sturm's temporarily reimbursing defendants' advances "until final settlement," when "the expenses were to be prorated." The letters do say, however, that the defendants had advanced the money, that Sturm's account is overdrawn, and that the defendants require that the money be repaid or secured.

Appellant's counsel quotes, as supporting the proposition above quoted from their brief, a fragment of a sentence from Schumacher's letter of May 18, 1875, (p. 2161), viz.: "Through a new arrangment with property mortgages, etc., funds to cover our advances." If they had quoted the remainder of the sentence they would have been denied the poor comfort the fragment afforded. The whole sentence reads: "What has become of your trade in property? You also promised to procure for us—through a new arrangement with property, mortgages, etc.—funds to cover our advances, *as it must especially be our aim to get possession of the moneys again*, respectively to receive collaterals which can be used to procure the same, as we can use them very well in our business. Please let me know how this matter stands." The letter is set out at page 2161.

On page 74 of their brief appellant's counsel quote a letter from Schumacher to Sturm, dated April 1, 1875. They

then say that when this letter was written, according to defendants' present position, Sturm owed defendants more than $100,000, and then ask this question: "Under such circumstances, why should they have said to him (referring to an expression in Schumacher's letter of April 1, 1875,) that if the proposed compromises were successful he need not 'take any financial steps in Indianapolis?'" The answer is, they did not say it. They made that remark not with respect to compromises of insurance cases, or compromises of any kind, but with respect to a trade Sturm had on foot, by which he expected to exchange his Indianapolis property with a man named Miller, for Brooklyn city property, after which Sturm expected to remove his residence to Brooklyn. (Sturm's X-Ex., p. 802.) The remark in Schumacher's letter needs only to be read to show that appellant's counsel pervert its meaning. It is as follows: "Just now a Mr. Miller was here. I showed him the papers, deeds, etc., *of your lots*, and he seemed to be satisfied with it. *Should the matter be successful* you need not take any financial steps in Indianapolis, and you would be here again soon, which would be best."

The remarks upon page 55 of appellant's brief are based upon this misconception of Schumacher's letter. The letters referred to by appellant's counsel disprove the proposition to which they cite them. They show Sturm to have been the debtor and H. B. & Co. his creditors.

Appellant's counsel, in their brief, on page 75, assume that, had a possible compromise of the insurance litigation been effected in 1875, and had Sturm then charged back on Boker & Co. a *pro rata* share of the expenses, Sturm's debtor-balance to defendants, on his bank account, would have been liquidated, and Sturm would have had money left. They say that Mr. DaCosta proposed a compromise of all the policies at seventy-five cents on the dollar, but that none of the companies were finally willing to settle

save the Atlantic, and Boker & Co. refused to settle with it alone, and that this determination put a stop to negotiations for compromise. They cite, as bearing upon the subject, several letters and telegrams by number. (Page 76 of appellant's brief.)

The first cited is a telgram from Sturm of April 4, 1875, which answered a letter of Schumacher's dated April 1, 1875. That letter is set out in Schumacher's testimony of 1881 (p. 2159). In it Schumacher tells Sturm that DaCosta yesterday "gave us hope for a compromise with the insurance companies. He starts with the idea that the Albany (the Atlantic case was in appeal at Albany at that time) judgment must be used as a lever in order to settle with the other companies, and is of the opinion that if about $56,000 or only $50,000 clear, Atlantic included, could be obtained, it might be an acceptable offer. The Albany judgment he believes to be good for the full amount. However, with the other insurance companies, it lacks considerable on account of the defection of our witnesses. He thinks that if we add the sum of about $40,000, already received, and submitted the articles shipped to a strict revision in regard to value or cost prices, the result might be a satisfactory one. He has—by chance—spoken with Hand about a compromise, and the latter has come back on it after a few days, unprovoked. A minimum amount has not been mentioned, but DaCosta should like to hear our—your—views about it in order to have a basis."

This letter was answered, as we have said, by Sturm's telegram of April 4th. (Appellant's No. 413.) It is set out at page 799, and reads as follows:

"Letter received and carefully considered. Our mutual interests require a prompt settlement of this matter—if this can be done honorably—I ask you to instruct both counsel to accept your terms, to which I agree. Do not hesitate to act for me."

Sturm, in answer to cross-question 3002, page 799, said,

that he sent this telegram, and believed that he had a press copy of it, but that it was not at hand; and in answer to cross-question 3005, said he would look for a press copy of the telegram, adding, "Because I have seen that recently." April 4, 1875, was Sunday.

Sturm, on April 7, 1875, further answered Schumacher's letter of April 1, 1875, by a letter, which is set out at page 801. (Appellant's No. 415.) In it he said:

"For several days I was going to write to you, but my wife was so sick, and otherwise I had my hands so full, that I could not come to it. I telegraphed you Sunday in answer to your letter, and will only add now that I hope the compromise will be accomplished, although your letter is dated *April* 1.

"DaCosta's memorandum I understand well enough, and although he calculates entirely wrong, as he does not take into consideration the long years and expenses which we had, it may be the safest and best that we can do at present. Should anything come up now, where an immediate answer or decision is necessary, you may do just as you think best, and I will approve it."

In answer to cross-question 3016 (p. 801), Sturm says he does not know whether he has a copy of this letter or not.

STURM'S "LETTER" OF APRIL 4, 1875.

Appellant's counsel in their list of letters, on page 76 of their brief, include one (No. 414) alleged to have been written by Sturm to Schumacher, dated April 4, 1875. Sturm sets out a copy of this letter on page 799 of the Record. He says that he is not sure that he has a *press copy* of it, and that it is possible that the original may have been written in German. If a press copy of this letter appeared in any of Sturm's letter-books the fact was never disclosed in the testimony, nor did he ever explain how he could have a copy of a letter and yet not know whether the original was *written in English or German.*

Mr. Schumacher, in his examination of 1884 (p. 2928, q. 856, *et seq.*), said that this letter was never received by

him, that he had no knowledge of it, and that it had not been received, to his knowledge, by his firm. Mr. Rabing (pp. 3207, 3208) said that he had no knowledge of such a letter and that both he and the defendants had searched for letters from Sturm and could not find this letter.

Sturm's "copy" of the "letter" of April 4, 1875, begins thus "Your letter (answered to-day by telegraph) was pleasing to me, and I sincerely hope that some satisfactory arrangement can be made to close these infernal insurance suits. There is but little glory in fighting them and too much expense and annoyance to all of us. I believe, no, feel sure, that eventually we can get *all*, but taking into consideration time, trouble and cost, we shall in the end not be very much better off than we would by a fair, square settlement *now*."

This letter was not received. Sturm had no press copy of it. Where the "*copy*" he offered came from, or how it was produced, the record does not disclose. Sturm had no copy of his genuine letter of April 7, 1875, but he had a press copy of his telegram of April 4, 1875. In his genuine letter of April 7, 1875, he apologizes for not having written, saying, "for several days," his wife had been sick and he was otherwise engaged, and then says: "I telegraphed you Sunday *in answer to your letter, and will only add now* that I hope the compromise will be accomplished, although your letter is dated *April 1st*."

In this letter he says nothing of his having written a letter, as well as the telegram, on Sunday in answer to Schumacher's letter of the 1st, and he apologizes for not having written.

We submit that it is apparent that the "letter" of April 4th was not written on that date; that it is spurious, and would not have been produced had Sturm had a copy of his genuine letter of April 7, 1875.

The next communication referred to by appellant's counsel (No. 416), is a telegram from Sturm to Schumacher

of April 29, 1875, and is set out under cross-question 3018 (p. 802). It is as follows: "Please telegraph your opinion of prospects. Is anything being done?" The next is Schumacher's telegraphic reply of the same date (No. 417), and is set out under cross-question 3019 (p. 802), and is as follows: "Our proposals are entertained, and things are working slowly but hopeful on basis of about 70 net."

On the same day, April 29, 1875, Schumacher further answered Sturm's telegram by a letter, which is not referred to by appellant's counsel. It is set out in Schumacher's testimony of 1881 (p. 2160). In that letter Schumacher gave Sturm the details of Mr. DaCosta's efforts toward a compromise, and in it showed that Mr. Parsons, Sturm's counsel, was being consulted by Schumacher on the subject.

The next letter referred to by appellant's counsel (No. 420), was from Schumacher to Sturm, dated May 18, 1875, and is set out in Schumacher's deposition at page 2161. It answered a letter of Sturm of May 6th, which is not in the record. The letter of May 6, 1875, related to certain efforts of the insurance companies toward taking testimony in the city of Mexico, as is indicated by the first paragraph of Schumacher's letter of May 18, 1875. In that letter, Schumacher, speaking of the proposed compromises, said: "We have not yet succeeded with our attempts at a compromise. Hand writes that he can not bring the different companies together, to which we replied, asking how many of the companies felt inclined to accept the proposals, in order to arrange with one-half or three-fourths of their number; however, on this came no satisfactory answer, but he offered, in case we would arrange with the Atlantic alone, to give the matter his whole attention. We can not accept this, and prefer to await the decision in Albany, which ought to be expected in June, when we hope the judgment will be affirmed. In case this should prove true, we could, with renewed vigor, attack the other companies."

The next letter referred to by appellat's counsel (No. 423) was from Sturm to Schumacher, dated May 23, 1875, and is set out in Sturm's cross-examination (p. 805). It is a long letter on the subject of the claims against Mexico, but concluded with a paragraph on the subject of compromising the insurance cases, as follows: "I am very sorry that the compromise with the Atlantic *and others* has not been accomplished. I was in hopes that something would come of it, and as you wrote me that in that case I need not take any further financial steps, I have until now omitted to do so, for it only costs trouble and expense. For me, a meagre compromise now would be worth more than the whole money next year, for, as matters are now, I can not even turn any more, and to leave my affairs here in strange hands and to come to New York altogether, I can not without that I sell out here and commence something there. I have now battled eight (8) long years with these companies and spent a fortune, and am to-day not yet further, or only a little further than then. I therefore request you once more to try through DaCosta or others, and should nothing be decided within a fortnight (except you wish different), I will have the mortgages made out. With my trade in Brooklyn nothing has been decided yet. Judge McCue and others sent an agent here, who returned to Brooklyn last Tuesday very much satisfied, but up to the present I have heard nothing further."

The next and last letter referred to by appellant upon this subject (No. 424), is a letter from Schumacher to Sturm, set out in Schumacher's direct examination of 1881 (p. 2161), and dated May 26, 1875. It answered Sturm's letter of May 23, 1875, above referred to. On the subject of compromise it says: "I also called to-day on DaCosta, and am sorry to report that nothing new has transpired in the compromise matter, and at present there is no hope that anything will occur. A settlement with the Atlantic alone is not advisable, as I

already wrote you, and we have to arm ourselves with extraordinary patience." After stating that the decision in the Court of Appeals can hardly be expected before September, the letter continues: "Until this decision comes, none of your other cases will come to trial. We will not try it, and it will not be granted to the other side, on which DaCosta lays much stress."

When the genuine correspondence is thus read together it does not support the assumption of appellants' counsel, stated on pages 75 and 76 of their brief. There was nothing in it about Sturm charging back on H. B. & Co., any part of the expenses of the litigation. On the other hand, Sturm spoke not of his having advanced large sums for such expenses, but of his having *"spent"* a fortune, and eight (8) years of his time, and he mentions that Mr. DaCosta, H. B. & Co.'s counsel, does not fully appreciate this. Had Sturm been *expending H. B. & Co.'s money* and devoting *his time* upon *their employment, H. B. & Co.'s counsel,* Mr. DaCosta would *have known and appreciated the fact.*

There was as this correspondent shows, no controversy or difference of opinion between Sturm and H. B. & Co., as to the propriety of using the Atlantic judgment as a lever against the other companies, or at least some of them, in procuring a compromise. Sturm and the defendants each in turn expressed regret that a compromise *with the Atlantic and the other companies* was about to fail, but neither intimated that it would be wise to settle with the Atlantic alone. There was nothing in it about "pro rat-rating" insurance expenses.

On page 76 of their brief, under the same heading, "Compromise in 1875," of insurance suits, appellant's counsel refer to a letter of Sturm to Schumacher, dated August 29, 1875, and states some of its substance. It is set out in Sturm's cross examination (p. 671). They also refer to Schumacher's letter in reply dated September 1st, and quote therefrom a fragment. Schumacher's letter is

set out in the same cross-examination (p. 673). They say that Sturm answered this letter by his letter of September 15, 1875, set out in his direct examination (p. 357), in which he said he intended to make an assignment, etc. They say this letter brought Boker to Indianapolis, etc.

That the court may the better understand these two letters referred to by appellant, we now make reference to the correspondence immediately preceding them.

Schumacher, in his letter of May 18, 1875 (p. 2161), asked Sturm whether he had succeeded in his efforts to trade his Indianapolis lots for Miller's property in Brooklyn, and added: "You also promised to procure for us, through a new arrangement with property, mortgages, etc., funds to cover our advances, as it must especially be our aim to get in possession of the moneys again, respectively, to receive collaterals which can be used to procure the same, as we can use them very well in our business. Please tell me how this matter stands."

Sturm, in his letter of May 23, 1875 (p. 805), replied, saying, among other things, that he regretted that a compromise with the insurance companies had not been effected, and added: "I therefore request you once more to try through DaCosta and others, and should nothing be decided within a fortnight (except you wish different), I will have the mortgages made out. With my trade in Brooklyn, nothing has been decided yet."

On May 26, 1875 (p. 2161), Schumacher wrote Sturm, saying for the present there was no hope of a compromise the insurance cases, and added: "We leave it to you how, according to your inclination, you will arrange it with the promised mortgage notes; if the Brooklyn trade is not accomplished, which I think you may find out sure within a fortnight, the notes might be made out; they can always be used as security when contracting a loan."

Sturm, on June 1, 1875 (p. 807), replied to the last letter, saying that nothing had yet been accomplished in his Brooklyn trade, but that he had been trying *to sell*

some of his Indianapolis lots, and then continues: "I have an offer for half a block (six or eight lots), if I will take as first payment, lumber in place of cash, and will make the other payments due in two or three years, for which I would then receive mortgage notes with six per cent. (if possible, eight per cent.) interest as purchased money. * * * * * Now I must know at once whether you can use two and three years' notes there as collateral, for that is my principal aim, though I should wish to sell something for my own account, and even have to, however so much I should like to wait a year longer. Should these notes serve your purpose, I will at once do my best, as I think I can use the lumber." After saying he proposes to include the six lots transferred to Mr. Funke and would, to save a double transfer, ask Funke to deed them direct to the purchaser, he continues: "This morning two gentlemen will go to Illinois to look at the land. Should it be possible to make a trade to my satisfaction, it will not be necessary to sell so many of my lots. Please confer with Mr. Funke and Boker, and write to me at once; let me know how you wish to have it arranged. The mortgage and notes I would then send to you; they would also either be made out in the name of H. B. & Co. or Mr. Funke just as you wish. * * * * * Now, if you can use the notes, please telegraph me 'all right.' * * * * * P. S.—Should everything be satisfactory (in case it is not, you must let me know distinctly your wishes), and you can use these notes, would it not be possible to get, through you, about $5,000 from somebody, on such notes, for myself? The money will only be used to further improve the respective property." We have set this letter out in full at page 126, of this brief.

On June 5, 1875, defendants wired Sturm in reply (p. 808): "All right, one, two and three years. Get highest interest;" and by letter of same date (p. 355) confirmed the telegram, and further said: "Send us now of them (the notes)—say $35,000, against which we shall

return you the deed formerly given. We will also try to make a loan for your individual necessities. * * * * Please see to it that we can set in motion these financial means, as money is now very easy, and lenders will not be very strict during the low rate of interest. Hoping that the Illinois land may bring something (throw nothing away); also, that perhaps the Brooklyn trade may succeed, or finally that the judgment against the Atlantic in Albany may be affirmed; and lastly, that Mexico may keep its obligations when everything will be in order. I am expecting your answer."

Sturm on June 11, 1875 (p. 808), telegraphed Funke: "Send me power to sell, duly certified by self and wife before Indiana Commissioner, also deed; this may save time. I shall attend to returns as agreed." On June 13, 1875, Sturm telegraphed Schumacher to hold the power of attorney until his letter should arrive (p. 809). Sturm wrote Schumacher June 15, 1875 (p. 809). In this letter he said: "I am now ready with the lots in so far that I can conclude a sale at any time, and telegraphed you on Saturday for power of attorney, which however I modified in my telegram of Sunday night, as Mr. Martindale, the buyer, would rather have the deed direct instead of by attorney. I have asked $200 per foot, and he is willing to pay that price, but on account of the bad times and many expenses, he will make the payments in two, three and four years instead of one, two and 3 years, and will pay eight per cent. interest, otherwise, he will pay only six per cent. interest, or have a reduction in price. Now, what shall I do? You know that I wish to have everything arranged to suit you. I could possibly get nine or ten per cent. interest against a modification in time or amount; however, it is necessary to give ample time for the first payment. I can then sell also two of my lots. It will therefore show as follow:

"Six lots at $8,000	$48,000 00
"Less incumbrance to be assumed...	3,600 00
"$44,400 00	

"I take in trade $5,000, and in notes of about $13,000 each—say $39,000. * * * * It (the deed) has to be made out to William Martindale, of the city of Indianapolis, Marion county, State of Indiana, for the consideration of $48,000, less incumbrances of $600 on each lot. I will then get the notes and mortgage here. In case Mr. Funke could leave out the consideration, I can fill that up here. *I have to pay the taxes and interest up to August,* and if I could do it I would pay the first $600 on each lot, in order to make the mortgage so much better, but the money is not there."

Schumacher, on June 18, 1875 (p. 2162), by letter replied to Sturm's letter of June 15, expressing the hope that Sturm could in some other way provide for his wants and save his Illinois land, and saying: "In regard to the sale of the lots we advise you to conclude the same on two, three and four years' payments, as we thereby get more interest." The letter contains directions as to the drafting of the notes, a power of attorney to show the purchaser that Sturm was authorized to act, and then follows this sentence: "Please let us know how much the taxes and interest to August amount to, and if you have not got the money we will *advance* the same."

On June 22, 1875 (p. 812), Sturm wrote Schumacher sending a deed for execution by Mr. Funke. In the letter he said: "I have received $8,400 for each lot and promised to take notes at two, three and four years with 8% interest on the first notes and 10% on the other two notes, payable annually in New York, either at Winslow, L. & Co., or (if you wish) at any other bank. *I can not tell you to-day how much the taxes until August and the interest on the* $600 *for each lot up to July* 1*st amounts to* but will know everything by the time the deed comes back and mortgages are ready, *and if I can not do otherwise will draw on you for this.* I am very short, but as soon as I have sold a few more lots, which will be soon, I will send you the notes in case you can turn them into

money there. The notes for these six lots I will send you at once upon delivery of the deed, and the mortgage as soon as it has been recorded. You therefore receive, after deducting the $3,600 incumbrance and about $5,000 in trade, notes amounting to about $41,800, three notes on each lot."

Schumacher, by letter of June 26, 1875 (p. 2163), acknowledged receipt of the letter of June 22, and stated that the deed had been returned duly executed.

Sturm on July 2, 1875 (p. 813), wrote Schumacher saying that he had sent Mr. Funke on June 29, by express, eighteen notes for $2,322.22 each, and that he had drawn on H. B. & Co. for $250 to cover taxes and interest on the prior mortgages. He adds: "Should it be possible for you now *to raise also a little money for me*, I should feel greatly relieved, and would then send you the necessary notes. I should like best if I could sell a few notes out and out, even if I lose the discount, for as it is, I lose anyhow."

On July 17, 1875 (p. 813), Sturm telegraphed defendants asking whether they had received the mortgages, and saying, "I will go to Washington next week."

Schumacher, on July 17, 1875 (p. 2163), replied by letter, saying that the notes and mortgages, "which were very welcome to us all," have been received. * * * * "I am very glad that you will go to Washington next week. I always like to see you move there, rather than in Indianapolis, *as in Washington all our interests are centered*, and you can always make yourself quite useful there."

Sturm, on July 31, 1875 (p. 3034), was in New York, and wrote defendants a note, addressed to Mr. Rabing, asking that they send him "by bearer" $50.00

On August 23, 1875 (p. 942), the defendants, by Rabing, wrote Sturm a letter, saying: "I returned this morning, and found you had gone, therefore, I beg to inclose a receipt, which you will please sign and return." The receipt was for $20 on August 13, $50 on August 14, $300 on August 17 and $100 on August 21.

On August 28, 1875 (p. 943), the defendants wrote Sturm, saying: "Inclosed we beg to hand you eighteen vouchers, amounting in all to $3,045, which we have charged to your account. *We also beg to inclose your pass-book, balanced per this date, and showing a balance of* $24,567.21 *in our favor, which we trust you will find correct.*"

Sturm's letter of August 29, 1875 (p. 671), relied upon by appellant's counsel, and referred to in their brief (p. 76), can now, in the light of this correspondence, be read intelligently. It is as follows:

"INDIANAPOLIS, August 29, 1875.

"DEAR SCHUMACHER—I am sorry that I have to trouble you anyhow, but I can not help it. Since my return I have tried everything to make a loan, and have positive assurance that I shall get in October $10,000. However, I must have money now, and also have peace, in order to make out my memorial to the Umpire, which will take me a few weeks. I must raise $4,600—and have arranged with the bank here so that I can pay in installments, viz.: $2,000 September 1, $1,500 on the tenth, and $1,100 on the fifteenth of September.

"I herewith send you these notes for the respective amounts and dates; will you be so kind and consult Boker & Funke; if you will discount these notes for me there for the ninety days, I shall positively pay them promptly, and in case I get the money sooner, will send it to you at once. I have made the notes on ninety days, in order to obviate all possibilities, and you may depend upon it that no delay shall take place in the payment. I, therefore, earnestly request you to telegraph me on Tuesday evening or Wednesday morning (September 1). I will then, in case all is right on the above mentioned days, draw on you at three days' sight. If I can not get it through, I don't know what I shall do, for under the present circumstances, I could not raise here in Indianapolis even fifty per cent. of the value of my property.

"In a few months it will certainly be different again, that is what the bankers say, but at present nothing can be done? The companies who promised me money on my lots are the U. S. Mortgage Co. in New York, and Phœnix Life of Hartford, but before October I can not

get anything from them; then I shall be sure, however. Both offer at nine per cent. p. a.

"I have heard nothing new about the Mexican matter, and I must hasten to hand in my further remarks or briefs during the coming three weeks.

"Regards to all.

"Yours, "H. STURM.

"P. S.—You can make the notes payable wherever you like best, and I have therefore left it open, only let me know.

"Yours, "H. S."

Schumacher's reply by telegram and letter of September 1, 1875, also referred to by appellant, is set out at page 673. We quote them from Sturm's cross examination of 1882:

X. Q. 2057. "Produce the letter of Mr. Schumacher that you have referred to, written in response to your letter of August 29, 1875.

A. "I first received a dispatch from Mr. Schumacher.

X. Q. 2058. "Give the dispatch.

A. "It says, under date of September 1, 1875: 'Sorry not to be able to comply with your request. Await letter.' Signed, 'Schumacher.' Now, the letter is dated New York, September 1, 1875, and, being translated from the German, is as follows:

"'DEAR FRIEND STURM—Your dear letter of the twenty-ninth of August has been received by me. I have submitted the same, and advocated your request, but it is not considered advisable to comply with your request. I am indeed very sorry not to be able to give you any better advice. You ought not to have called on me, but on the firm, or on H. F., or B., although I do not want to say that it would have gone any better. B. will absolutely not do it, *because we are getting in too deep, and owe it to ourselves not to go beyond our means.* Is it not possible that you can keep the bank there in abeyance? Perhaps as we are already in September, the Albany decision will soon come, and then if such is favorable for you then—you are all right! I can not tell you how disagreeable it is for me to communicate you this disappointing answer, but I have, after all my endeavors have failed, no other selection. The notes I will keep in the meantime here. I have nothing further to say, and hope also that this bit-

ter, disagreeable time will soon pass away, and we will breathe more freely again. Dear Sturm, we all have to carry our load, and one always thinks himself 'more burdened' than others; but one must not lose courage, nor his head. I write this to you privately.

"'Yours, "'FRED SCHUMACHER.'"

When these two letters in full are read together, they do not support, but refute appellant's contentions. Sturm was cramped for means, and besought Schumacher as a friend to help him out. Schumacher could not help him, and told him so in a kindly way. Appellant construes one phrase in Schumacher's letter of September 1, 1875, "perhaps the Albany decision will soon come, and then, if such is favorable for you then, you are all right!" to mean much, viz: that Sturm would get enough out of the Atlantic judgment, when paid, to pay all of his debts to the defendants. The letter says nothing of the kind, and such construction of it is *forced*. It was merely an encouraging remark to a friend in distress. So far as Schumacher then knew, Sturm owned all of the Atlantic judgment. If he collected it, he would have in hand about $50,000 in money. We submit that when Sturm, wrote the letter of August 29, 1875, that amount of money, even if he used it all in reducing his indebtedness, would have had the effect to relieve his financial embarrassment, and in that sense make him "all right."

Appellant's counsel say, after citing this letter of September 1, 1875, that "Sturm wrote back on September 15, 1875, saying that he intended to make an assignment." He did not "write back" in the sense here implied. On the other hand his friend and agent Naltner "wrote back" on September 5, 1875, a letter which appellant's counsel do not mention. The letter is set out in Sturm's cross-examination of 1882 (p. 816), and is addressed to Schumacher. It asked that the defendants send the "cotton-press stock, which General Sturm left in your care in a package." It represented Sturm as dangerously ill, and

suffering from a stoke of paralysis, and asked that Schumacher advise Mr. Parsons of the fact.

On September 8, 1875 (p. 356), Schumacher wrote Sturm, answering Naltner's letter, and sending the cotton-press stock. He enclosed the letter to Naltner to deliver, if Sturm's condition would admit. Sturm produced this letter and said he supposed Naltner delivered it. (P. 816.) The letter was a friendly one of encouragement to Sturm in his sickness, and spoke about the claims against Mexico.

Then followed the letter of Sturm of September 15, 1875 (p. 357), relied upon by appellant's counsel. It reads:

"INDIANAPOLIS, September 15, 1875.

"DEAR SCHUMACHER—I have been very sick, and to-day I am out of bed for the first time, and so weak that I can not stand and hardly write. Doctor says it will be some time before I am in good condition again. My situation has in consequence become such, that I have no hope to obtain money and I can not wait on the Atlantic judgment, and shall be forced probably next week to make an assignment. On Sunday I consult with some friends what I had better do, to-day I am too weak. My debts are few and I have plenty property, etc., but that all can not help me anything at present. My affairs here are in order and very simple, but the New York affairs are somewhat complicated, and as I must include that as well as everything else, I wish that, to avoid any error, you send me a statement of how I stand with you according to your books. Please do this at once so that I may bring everything into order before. It is a pity that it has to be so, but I have done my best and can not help it now, and wish now I had dropped the insurance affair years ago. Please do not neglect this, as I have not time over the 20th.

"With regards,

"H. STURM."

This letter shows that Sturm knew that he was indebted to the defendants, for he called upon them for a statement of the amount as shown by their books, to the end that he, Sturm, might include the amount in his schedule of liabilities with his proposed deed of general assignment. While Sturm's letter was in transit, on September 16, 1875,

Schumacher wrote another letter to Naltner mainly in regard to Sturm's health. The letter was produced by Sturm in his cross-examination, and is set out on page 817. Sturm's letter of September 15, 1875, reached the defendants on Friday, September 17, and on the same day Mr. Boker started for Indianapolis, arriving there, after delays, at 2 o'clock Sunday morning.

BOKER IN INDIANAPOLIS, SEPTEMBER, 1875.

Mr. Boker, in his testimony of 1884 (p. 2467, q. 138, *et seq.*), said that early in September, 1875, Schumacher received from Naltner an alarming letter, stating that Sturm was seriously ill; that on September 17, Sturm's letter of September 15th, in which he expressed his intention of making a general assignment, came; that immediately thereupon, and on the same day, defendants consulted together and determined that Boker should go to Indianapolis to see how Sturm was as respects his health and financial condition; that the letter of Sturm asked for a statement of his account with the defendants. Mr. Boker says that a statement was made up as far as it could be that day, which he took with him; that he left New York Friday evening, September 17, 1875, arriving at Indianapolis at about 2, Sunday morning; that he stopped at the Bates House; that, on the same morning at about 10 or 11 o'clock, he went to Sturm's house and had a general talk about his health and financial affairs. Mr. Boker says that at that time Sturm gave him the data as to Sturm's assets and liabilities which he, Boker, entered in the memorandum introduced in his Astor House examination (p. 2124 of this record); that after this talk, which was had in the old house where Sturm then lived, he was shown through the new house near by; that they then took dinner at Sturm's, during which there was only social talk; that after dinner, Heath took Boker for a drive, at the conclusion of which he immediately went to his hotel and sent the following night-rate telegram to his firm: (P. 2468.)

"'INDIANAPOLIS, IND., Sept. 19, 1875.

"'Received at Western Union Building Broadway and Dey street September 19th.

"'*To Hermann Boker & Co.*, 101 Duane street, New York:

"'General's affairs better than I expected. His health is better. Don't think mortgage notes worth the full amount. Leave for Chicago Monday night, Tremont House. ALBERT.'"

Mr. Boker says that the same evening he sent to his firm (p. 2469) the following letter:

"'Hotel Bates, James O. Ives, proprietor.

"'INDIANAPOLIS, IND., SUNDAY the 19th Sept., 1875.

"'DEAR HERMANN & SCHUMACHER—I arrived here last night at 2 o'clock instead of 11 o'clock and went to-day at once to General Sturm, whom, although still suffering, I found considerably better than I expected; he has still to keep his room, particularly as it is so very cold.

"'His financial affairs are better than I believed to find them. His entire debts which he has here are about 5,000 dollars and all that to the first National Bank ($3,000 overdue note and about $2,000 overdraft). Sturm thinks he might get an extension on the note, but the bank wants the money for the overdraft and threatens to sue if it does not get it this week and would then get a judgment in ten days, *which would be disagreeable to him, particularly for the Insurance Suits;* to-morrow we must see now whether the bank will proceed so severely, and we can then consider further in New York as soon as I am back. In New York he owes, besides us, only Benedict $1,100 (with interest about 1,500), which have been entered on the Atlantic Judgment.

"'His assets here are thirty-four lots which, over and above the mortgage of $600 on each lot, should be worth, under the hammer, *as he says*:

$50 per foot, *i. e.* $2,000 per lot, makes	$68,000
Land in Illinois, about 1,500 acres	15,000
His factory, under the hammer	11,000
	$93,000

"'On some lots, opposite those on which we have the mortgage, he has built himself a fine house, which is not

finished, however, he puts this down for nothing as there is a mortgage of $13,000 and other debts against it, it has cost him $22,000, which does not seem much to me.

" 'Now, *as to our lots, that* is the mortgage notes, it does not seem to me to look so well. The lots are fine and will, in time, bring a good price, but $200 per foot for which Martindale is said to have bought them seems to me very high. I think $100 is somewhat nearer to the price, the matter would then stand thus:

6 Lots at 100 (4,000) $24,000
1st Mortgage, 600..... 3,600

$20,400

" 'Until the notes are due all may change considerably. Indianapolis is a rising city and is growing much. There is more building going on here than in any city I have seen, so far. *To-morrow I must find out how Martindale is, and I can then report to you further; to-day Sturm sent you the satisfaction piece for Parsons.* Parsons had inquired of Sturm whether he owed us anything, see Parsons about this. To-morrow night at 12 o'clock I go to Chicago, where I hope for news. Von Tine's letter of Friday evening, I received this morning. Treadwell's case is said to be different from ours. Sturm claims his contracts are of 1860 and '61, when Vega had no power of attorney yet, the power of attorney to bring our Arms had come later. I hope it is so!

" 'Our customers I will visit to-morrow and fix up statement with Sturm, of which I will bring along a copy. Tuesday night I expect to leave Chicago and telegrams can reach me in Tremont House until 4½ o'clock.

" 'Yours, F. A. Boker.

" 'How is Galveston. I hope Spencer has paid.' "

Remark: This letter is written on three letter-heads of the Hotel Bates.

Mr Boker further testified (p. 2470) that he received by mail from Rabing, on Monday morning, the memorandum of credits to which Sturm was entitled, which is set out in Sturm's direct examination (p. 359, q. 505)"; that he had directed Rabing, the day Boker left New York, to make

and send him this statement. Boker further testified that he spent Monday morning among his Indianapolis customers and at the office of the Recorder of Deeds examining the recors of the Martindale mortgages, and inquiring as to the value of the real estate. He says that in the afternoon he went to Sturm's house and handed Sturm the statements of account brought from New York and the memorandum of credits sent him by Rabing, the statements referred to being those set out in Boker's earlier examination as Exhibit No. 3 (p. 2124); that at that interview he and Sturm had a general talk about Sturm's affairs, in which Sturm told him he had concluded not to make an assignment; that he went from Sturm's house to his hotel and wrote a letter to his firm, a translation of which is set out at page 2471, as follows:

"'Hotel Bates, James O. Ives, proprietor.

"'Monday. INDIANAPOLIS, IND., Sept. 20, 1875.

"'DEAR HERMANN & SCHUMACHER—I wrote yesterday and received this morning Rabing's letter (copy) about Chicago customers. The whole morning I have been with our customers and have privately made inquiries about Sturm's real estate. Many think $50 per foot, say $3,000 per lot is not too much, others think it is too much while others believe $50 is cheap. I was very careful and have never mentioned Sturm's name. Then I was one hour in the recorder's office and I have found everything as Sturm has told us, which has pleased me very much. Martindale *is worth nothing* I believe he is slippery, and if the property does not increase in value then he will pay neither interest nor notes, but we must await that. Sturm's health is improving slowly. I was with him the whole afternoon and have talked over much with him, he will make no assignment unless he is compelled to do so and that has time yet. His friend New will come here in a few days and he will talk with him and then write us. I have told him I would talk with you and then write him if and how he can be helped. *Mexican claims Lewis Schumacher.* He showed me that the authority for Vega dated

March 10, 1865, and was cancelled again in January, 1866, while our contract is dated October 31, '65; if this is so then our claim is secure, unless other unclear points come between.

"'Treadwell's claims date from the years 1860, '61 and '64, when Vega had no power of attorney. The Eldridge claim which also belongs to Treadwell is said to be like ours. This one has not yet been decided.

"'R. W. Booth & Co., a great deal is talked about this firm and it is necessary to be *very careful*, do not loan him any more money and do not sell him anything. The customers here seem to be good.

"'I have given the statements to Sturm and will bring along a copy. At 11 o'clock to-night I go to Chicago. Auerbacher will be here on the 24th inst.

"'Yours, F. A. B.'"

Mr. Boker, continuing (p. 2472), says that since his Aster House deposition was taken he has refreshed his recollection, and finds that he was in error therein, when he said that he handed Sturm the statements on the first visit, and in the afternoon of the same day visited defendant's customers; that these things happened on the same day, but they occurred on Monday, the day of the second visit, and not Sunday, the day of his first visit, as stated in his earlier examination. Boker further says that he saw Sturm but twice, and left Indianapolis for Chicago at eleven o'clock Monday night, September 20, 1875. (P. 2472.) He further testifies (p. 2473, qq. 160–161 *et seq.*), that he did not conclude to go to Indianapolis until after the arrival of the mail, about ten or eleven o'clock Friday morning, and that thereupon he told Rabing to draw off from the books a statement of Sturm's account with defendants, which Rabing did, with Boker's help; that some of the books not being at hand, the credits could not be ascertained and entered before Boker left that day, and he therefore instructed Rabing to send him a statement thereof to Indianapolis the next day.

The memorandum sent by Rabing came to Boker at Indianapolis with memoranda about H. B. & Co.'s Chicago customers. The only letter received by Boker was a mere note from Rabing, dated September 18, 1875, reading: "Enclosed I hand you a copy of our letter of to-day, which we sent to Chicago care of M. E. Spencer & Co." (P. 2486.) A copy of the letter sent to Chicago is set out by Boker at page 2487.

Appellant's counsel broadly assert that the account which Boker brought with him to Indianapolis was a "*false* account, showing a debit against Sturm of $140,971.60." The paper referred to was set out by Mr. Boker in his deposition of 1881 (Astor House depositions), and is found at page 2124 of the record. It shows upon its face that it was intended to be only the debit side of Sturm's account. It charges Sturm with the merchandise consigned, with the gold premium, interest added, with his overdrawn bank account and interest, and with H. B. & Co.'s payments on account of insurance suits, interest added. The account was not footed, but when footed showed the total of Sturm's debits as of September 18, 1875, to be $140,971.60.

Sturm testifies in answer to question 504, page 359, that in his interview with Boker on Sunday, September 19, 1875, he was shown by Boker a memorandum of credits to which he, Sturm, was entitled. The memorandum credited Sturm with $39,455.03. It was produced by Sturm, and is set out in his testimony of 1882, page 359.

Mr. Boker, in his deposition of 1884, explains, as we have shown, that he did not leave any of the statements of account with Sturm at the Sunday visit, but that he left both statements the following afternoon, after receiving Rabing's memorandum of credits. He explains that there was not time to make up the whole account before he left New York, and that he directed Rabing to mail a statement of the remainder of the account the following day, September 18. The very form of the memorandum of

credits produced by Sturm corroborates Mr. Boker, and consequently disputes Sturm's testimony that Boker had that paper at his Sunday visit. It is headed "memorandum." "Hermann Boker & Co. to F. A. Boker." It is in Mr. Rabing's handwriting, and contains, after the figures, this expression: "We have, as Mr. Schumacher says, received yet more, which I can not find out at this time, as the books are missing." The figures "8,000" and "4,000," shown at the bottom of this memorandum, are in pencil, and Boker says were put on by him at Indianapolis, and he thinks were suggested by Sturm in the interview. (P.2488.) Sturm, in his cross-examination of 1882, says that Boker made these figures, and that he (Sturm) may have suggested them. (Pp. 700, 701.)

Rabing, in his testimony of 1884 (p. 3184-3186), corroborates Boker respecting the making and sending of the memorandum of credits and the statement of accounts taken out by Boker. We quote his testimony:

Q. 556. "What statement do you wish to make in regard to the statement of account set out in the Astor House deposition of Mr. Boker.

A. "On the 17th of September, 1875, Hermann Boker and Company received a letter from General Sturm. In consequence Mr. Boker intended to leave that evening for Indianapolis on the six o'clock train. I was very busy on that day; I remember it very well, and I drew up a statement very much in a hurry. I remember, even, that I dated it September 18th; also, I made it out on the 17th, as I thought it would be right to date it the 18th, to make just even years of interest. Mr. Boker on that day had to go home to get his valise, and when he came back I hadn't had time to copy the statement out which I had so made. Mr. Boker was in a hurry to get off, and said, "'Never mind; let me take it off as it is,'" which he did. I believe that statement which Mr. Boker took is not even added up; it does not even give the total amount. Mr. Boker told me that it would make no difference; that he would go over it with General Sturm and then make a copy of it in Indianapolis and bring it home. I could not finish up that statement on that day, as the ledger con-

taining the Mexican arms account was not at hand. I remember that fact very well, and I told Mr. Boker that I would give him the correct items the next day and mail it to him. That is all so far as the statement set out in the Astor House examination is concerned. I remember that we were all very busy on that day.

From the same deposition:

Q. 560. "Before we go too far away from the matter of the statements of account furnished by you for Mr. Boker on the occasion of his visit to Indianapolis, I wish to ask what further statement you have to make in regard to what is commonly called the 'Rabing memorandum.'

A. "In regard to that memorandum I want to say very positively that that was sent by me to Mr. Boker on the day after he left, and was on Saturday. I believe I testified before that I did not have the books handy, but I had a memorandum in my desk of a good many accounts taken from the foreign ledger for the sake of convenience, so as not to necessitate my looking over the old books. The Mexican arms account was one of them, and I made out this memorandum that I sent to Mr. Boker from the memorandum which I had on my desk. The Rabing memorandum, I believe, shows very conclusively that I did not have the ledger at hand, for if that had been the case I would have put down on the memorandum the correct dates as stated on the ledger, which are as follows: July 12, 1870, $5,000; August 15, $5,000; September 1, $5,768.78. Instead of doing that I put down on the Rabing memorandum all the three payments on the Mercantile in one sum, under date of July 12, the same as I had it on the memorandum which I had in the drawer of my desk.

Q. 561. "Make the memorandum that you have referred to as having been in your desk a part of your answer to this question.

A. "The memorandum from which I have been reading is written on a sheet of blue note paper of four pages, and is as follows:"

The witness on page 3187 sets out a copy of these extracts which he kept in his desk.

In the deposition of Heath, of 1883, complainant caused a "memorandum" made by Sturm, dated September 19,

1875, to be identified, but did not set it out. (P. 1250.) Afterward, in 1884, Mr. Boker, (p. 2497) read a copy of this memorandum, which complainant's counsel said was a true copy, and says, "it does not express the conversation we had." In cross-examination, Mr. Boker, to accommodate complainant's counsel set out this copy of the alleged memorandum, (p. 2546) and after doing so said: "The whole of said statement is incorrect in every particular, so far as it disagrees with the account I have heretofore given of the interview on Sunday, the 19th and Monday, the 20th of September, 1875; but in referring to the copy of that memorandum which was furnished us for information by General Sturm, it was not, and is not my intention to make it a part of my testimony herein." (P. 2549.)

Boker and Rabing and the letters and telegrams of Boker from Indianapolis to his house all contradict Sturm and his memorandum, "made at the time" of the September 19, 1875, interview. Complainant's counsel try to corroborate Sturm with the testimony of his son-in-law, Heath; the same witness who produced a letter-book containing numerous letters, which we have shown are spurious. But Heath does not claim to know much of what was said, as the conversations were, for the most part, in German—a language he did not understand. His testimony is indefinite, and shows that he is unduly influenced by Sturm. (Pp. 1246, 1302.)

Boker did not bring Sturm a false or fictitious account. He gave Sturm a detailed account of the debit side, which, when reduced by the credits shown upon the paper above referred to, interest included, would show Sturm's then true debit balance.

October 27, 1875, Letters.

On page 79 of their brief, appellant's counsel quote from an alleged letter from Sturm to Schumacher, dated *October* 27, 1875. Their object is to bring home to the

defendants notice that Sturm had on that day made over to the First National Bank of Indianapolis, as security, his Atlantic judgment, and his other insurance claims. The letter is set out in Sturm's examination. (Pp. 364, 365.) In the letter he claims to have told Schumacher that his indebtedness to the bank had, since August, 1875, increased from $4,600 to $16,000. In his cross-examination, beginning on page 715, he tries to explain in what way this increase occurred, but absolutely failed in the attempt. At the time he claims to have written the letter to Schumacher, October 27, 1875, he, in fact, wrote one to Mr. Funke, which was received. It is a lengthy letter, devoted to the insurance litigation, and begins by congragulating Mr. Funke on the approach of his silver wedding. It is set out in Sturm's cross-examination at page 677. It makes no mention of his having written or being about to write a letter to Mr. Schumacher. In this letter to Mr. Funke, he speaks of the time and money he, Sturm, has expended in the litigation, and considers whether it will pay to try another case, and then says (p. 679): "However, although you may be willing to put at my disposal the means (without which I could, of course, not do it), yet I request you to look at the whole matter from a business stand-point, and consider that if we should win this case (Lloyds), and afterwards the Atlantic should nevertheless go against us; there would also be a possibility that the companies would act once more as they had done before, and *that requires a capital which I have not got.*" The whole letter is important, but is too long to quote here. It concludes with a message to Schumacher. Sturm has a press copy of this letter. (P. 677.) He also has a letter press copy of the alleged letter to Mr. Schumacher, of the same date, but it is in a different copy-book. (P. 717.)

The alleged letter to Mr. Schumacher appears on pages 211 to 214 of Sturm's "pen letter-book." Each of these pages in the letter-book is of a blue color, discolored, Sturm says, by the acid he put upon the book since this

suit began, to bring out the writing. Sturm says that the writing was illegible and that he applied the acid. (Pp. 715, 716.) The press copy of the "letter" to Schumacher has upon it words interlined and added in pencil. Sturm does not recollect when he put them there. He is not willing to say when he added this pencil writing, whether before or after he used the chemicals. Sturm says that the two letters, one to Funke and the one to Schumacher, he enclosed in one envelope, and that he handed them to Mr. Slaughter, cashier of the First National Bank, the night they were written, for mailing. (Pp. 717, 718.) The letters on pages 208, 209 and 210 of the "pen letter-book," are all legible, and are dated October 23 and October 25, 1875. On the page following the "letter" to Schumacher, page 215, and the following page, are letters dated November 17, 1875, both of which are legible. From page 216 to 294 the pages of the book are blank. The letters on pages 215 and 216 are to Sturm's friend and witness, Allen. (P. 719.) The letter to Mr. Funke, which was received, is found on pages 31 to 34 of another copy-book. Pages 35, 36 and 37 of that book were at that time blank, as the letter found thereon bears date November 18, 1875, and the leaves of this book between pages 38 and 45 have been cut out. Sturm says, when asked whether Mr. Schumacher answered his letter of October 27, 1875, "nothing further than his reply, which you introduced here; nothing further than the letter of October 29, 1875, that has been already set out." (P. 722.)

On the strength of this statement appellant's counsel in their brief on page 80 say: "Sturm produced a letter from Schumacher acknowledging the receipt of both these letters. The defendants started the contention and attempted to prove by their own testimony that this *acknowledgment resulted from a wrong translation of a character used by Schumacher in his letter of the 29th.*" The contention, it will be seen, was started by Sturm in his cross-

examination of 1882, when he claimed that Schumacher's letter of October 29, 1875, acknowledged the receipt of two letters. (X.-Q. 2359, pp. 721, 722.)

The letter of October 29, 1875, produced by Sturm in cross examination, was mostly in German, and he read from Rabing's translation of it. It is set out on page 680. The opening portion of the letter, that on which appellant relies as a receipt of two letters, is as follows: "Dear Friend Sturm—I wrote you yesterday, and we have received this morning your esteemed favor of the 27th inst. Mr. Funke thanks you for your hearty congratulations, and I hope, too, that circumstances will soon improve and become more normal. We have consulted about your communications, and in order to neglect nothing, I have again seen Parsons, whose words and explanations I will try to reproduce. He said in substance: 'They (Cleveland) mean to try the case this time.'"

Schumacher goes on and in a natural way answers the business portion of Sturm's letter to Funke, but nowhere mentions the alleged letter to him (Schumacher), nor does he speak upon the topics therein considered. This letter acknowledged but one "favor" from Sturm, and it was the several "communications," *i. e.*, remarks or suggestions of that letter, about which the defendants had consulted together and with Parsons. (Schumacher q. 1769, *et seq.*, pp. 3047, 3048.)

On October 29, 1875, the defendants in their firm name, telegraphed Sturm, as follows: "Your LETTER of 27th received. We have answered to-day." *Sturm had lost this telegram.* (Pp. 679, 680.)

Schumacher, Funke and Rabing all testified that Sturm's alleged letter of October 27, 1875, was not received by the defendants. (Pp. 2875–2877, 3008, 2259, 3201, 3207, 3208.) Sturm is corroborated as to the writing and sending of this letter only by his son-in-law Heath, who says he saw it written, and by Mr. Slaughter, Cashier of the

First National Bank, who admits that he quit the service of the bank in 1876, under charges of embezzlement of a large sum of money. (P. 1403.)

Schumacher's letter of October 28, 1875 (p. 675), was in transit when Sturm's letter to Funke of October 27, 1875, was received, and when Schumacher's letter to Sturm of October 29 was written. In the letter of October 28 Schumacher said that Johnson and Higgins were inquiring about the Atlantic judgment, and claiming that Sturm had not paid them for their services, and asked: "How much can these people claim? We now fear that in case the decision should be favorable, other claimants might turn up, if they don't even levy upon it, *i. e.*, if you have entered into any further similar obligations, and we therefore would, *for our common best, request you to send us in suitable form, an order on Parsons for the amount of the judgment after deducting his bill, which he has to collect anyhow, so that the long-fought-for money might not fall into the wrong hands.*"

Sturm did not promptly reply to this letter nor to Schumacher's letter of October 29, 1875, and therefore, on November 3, 1875, Schumacher wrote Sturm, saying: "I wrote you twice, to which I have no answer as yet." (Sturm's x.-ex., p. 681.) Sturm says the letters unanswered referred to by Schumacher were those of October 28 and 29. (P. 682, x.-q. 2087.) Sturm says that he received the letter of October 28, 1875, on October 31, 1875, as he finds by an indorsement upon the letter, and that he knows that he received it before November 3, 1875. He finally admits, however, that on November 4, 1875, he answered Schumacher's letter of October 28, 1875, which asked for an order on Parsons for the proceeds of the Atlantic judgment, by a telegram, reading: "*Letter delayed. Send assignment properly made for me to sign.*" (Pp. 681, 682.) He tries to flounder out of this, however, by saying, as he does, that the letter of the 28th was received, in fact, *one*

day late, viz.: on October 31, 1875, and that he delayed answering because he had to get Cashier Slaughter's consent to his making the order in H. B. & Co.'s favor on Parsons. (P. 682.) This statement that Sturm waited until Slaughter, for the bank, had consented to the assignment, can not be true, for on November 26, 1875, Sturm wrote Schumacher telling him the *bank had sued him*, and adding, "upon inquiry they insinuated that they had been told that I had turned over the greatest part of my property to you." (P. 667.) The only thing he had turned over was this judgment, and that must have occasioned the criticism. The defendants understood this to be the ground of the bank's complaint, for Schumacher, in reply (November 29, 1875, p. 2167), said: "The bank does not take the right view of this matter if she thinks your assignment was only for our benefit." On November 5, 1875, Schumacher, as requested in Sturm's telegram of November 4, 1875, wrote Sturm, enclosing a form for an order on Parsons. The letter was identified by Sturm (p. 366), but by some oversight it was not set out. He says of it, however, that it enclosed the form of an order on Parsons. (P. 366, qq. 540–542.) On November 6, 1875, Sturm wrote Schumacher, sending affidavits as to Sturm's ill health, and a letter addressed to Parsons to be read by Schumacher and then mailed to Parsons. (P. 3049.) In his letter he told Parsons: "I am indebted to the First National Bank here. I have assigned the judgment to them (the bank), and they will probably present you the document through Messrs. Lanier & Co., whom you know." Sturm, on November 7, 1875, on receipt of Schumacher's letter of November 5, 1875, by telegram to H. B. & Co., recalled the letter intended for Mr. Parsons. (P. 3050.) The telegram was as follows: "Letter received. Have mailed the papers you wish. You must retain the letter sent last night and deliver other papers."

On the same day, November 7, 1875, Sturm also addressed a letter to Schumacher. (P. 818.) It enclosed,

as Schumacher had requested, the order on Parson, executed. In the letter he says: "I had already written another letter in regard to the assignment to the bank here. However, if Parsons will give the money to you, as it is, it will be just as simple." In this letter Sturm answered the inquiries of Schumacher's letter of October 28, 1875, as to Johnson & Higgins' claim.

On the same day, November 7, 1875, Sturm wrote Schumacher a second letter. (P. 819.) It relates largely to the claims against Mexico, but also speaks of the order on Parsons and speaks of the claim of the First National Bank. The letter is set out at page 819.

On November 9, 1875, defendants telegraphed Sturm that the Atlantic judgment had been affirmed. (P. 820.)

On November 10, 1875, Mr. DaCosta telegraphed Sturm as follows: "Sign and date November 6th, inst., and send following paper to Boker: 'For value received I hereby assign to Hermann Boker & Co. my judgment versus Atlantic Mutual Insurance Company, subject to payment of amount due and to become due by me to Mann & Parsons, Johnson & Higgins, and order on J. E. Parsons. (P. 683.)

On the same day, November 10, 1875, Sturm wrote Schumacher enclosing this assignment, executed, and at the same time telegraphed them that he had written. (Pp. 684, 820.)

On November 12, 1875, Schumacher wrote Sturm, acknowledging his letters of the 6th, 7th and 10th inst., and saying that he had withheld the letter to Parsons, dated Nov. 6, and in its stead had delivered the assignment sent by Sturm on the 10th. In this letter, Schumacher said: "It is well that nobody, except Benedict, First National Bank, etc., has special promise of success of the Atlantic judgment. The manager of Johnson & Higgins was here on the 10th inst. and also yesterday morning to claim

his share of the booty. [?] I requested him to write you direct, and to send his bill—disagreeable fellow." (P. 684.)

From this correspondence it appears, we submit, that Schumacher did not know that the First National Bank had, if, indeed, it ever did have, an executed assignment of the Atlantic judgment. He knew that Sturm had made some sort of a promise to pay the bank out of the Atlantic collection. While Sturm, in one of the genuine letters referred to (the undelivered letter addressed to Parsons), seems to speak of an assignment of the judgment to the bank as an accomplished fact, still he also telegraphed Schumacher November 7th not to deliver that letter, as he had mailed *an order on Parsons in favor of H. B. & Co. for the proceeds of this same judgment.* This indicated that no assignment had been delivered. In his letter of the same date, November 7th (p. 819), he said, speaking of the order on Parsons, then sent: "Should he (Parsons, for he is not interested at all whether I receive the money or not) not accept the order right away, it would, perhaps, be better to have it collected by J. C. New or Winslow, Lanier, *for the First National* Bank here, *in a proper assignment way.*" This again indicated that the bank had not as yet an assignment of the judgment.

Sturm, in the correspondence quoted, in the summer of 1875, had represented to the defendants that he owed the First National Bank $4,600, for the payment of which the bank was pressing him. He repeated this representation to Mr. Boker at the Indianapolis interviews, September 19 and 20, 1875, as is shown by Boker's testimony. (Pp. 2103, 2469.) If Sturm's debt to the bank had increased to $16,000, by October 27, 1875, defendants were not informed of it. That it in fact had not so increased, is shown by the testimony of the defendants wherein they say that John C. New, President of the Bank, after this date, and while acting for Sturm, offered to sell defendants the bank's claim—$4,800—for $2,500 ~~and cost~~ cash. (P. 2139,

qq. 125, 126. Sturm, pp. 750, 751.) The alleged letter of October 27, 1875, therefore recited an untruth as to the amount of the bank's claim, which makes against its genuineness.

We now quote from the letter of Schumacher to Sturm, of November 29, 1875, (p. 2167), referred to by appellant's counsel, on page 81, of their brief. "Now, this morning, we received your letter of the 26th inst., informing us of that new complication in shape of suit of First National Bank, of Indianapolis, against you, had arisen. We are truly sorry for this new trouble, particularly for your sake, for it will do nothing more than create extra bother and harrassing. The bank does not take the right view of this matter if she thinks your assignment was only for our benefit. We assure you that your debt to the bank has always been considered by us as a claim of honor to be discharged by us as soon as this Atlantic insurance money comes into our possession. We think that to make an assignment to strangers like Winslow, Lanier & Co., however good and reputable they are, would be alike to entrust a very important and valuable case into the hands or care of unsympathetic bankers, *pro forma*, who will only wait to receive something, but who will not pay the lawyers to go on with their labor; in fact, who will take things as they come, but who have neither time nor feel any interest to push on matters *as we, who are so deeply interested, always have done and still do.* Do the bank people think that these things, injunctions, suits, etc., move by themselves, *without the necessary funds* to push them, or are they willing to pay advances *as we did and have to do now? 'We repeat, that the bank shall be paid by us as soon as the amount of judgment is in our possession.'* Nobody ever has disputed their claim, which was always mentioned by you as the foremost of the few out against you. We are residents here, we are largely interested, we are responsible, and we make the needed advances. On these grounds we think ourselves to be the most fit to bring this matter

to such a result that nobody interested in your success has reason to complain." This letter, it should be remembered, was not written until several weeks after Sturm assigned the judgment to defendants.

The defendants never did get the $50,000 payable on this judgment, and of the $33,000 collected they received only about $22,311.11, (p. 3166.) For these reasons Schumacher says that the defendants thought that they ought not to be held to pay the full amount owing to the bank. (Pp. 3016, 3017.)

INJUNCTION SUIT.

Under this heading, beginning on page 81 of their brief, appellant's counsel argue that the parties vacillated as to whether Boker & Co. should intervene in an injunction suit, brought by the Atlantic Company to prevent Sturm drawing out the money paid in discharge of the judgment, and set up their assignment of the Atlantic judgment; and as to whether H. B. & Co. should set up absolute ownership, or that they held the judgment as collateral security. It will be seen from the remarks of appellant's counsel, on pages 82 and 83 of their brief, that this subject was mostly considered by Sturm. The letters show that Sturm wished H. B. & Co. to assert absolute ownership. Appellant's counsel say that if Sturm was indebted to H. B. & Co. "the natural answer to the injunction suit should have been and would have been, that H. B. & Co. had an assignment of the Atlantic judgment as security for Sturm's large debt to them. Issues were never made up in the injunction case." (P. 84 of Appellant's brief.)

That is precisely the position H. B. & Co. and their counsel, Mr. DaCosta, took, and when Sturm wrote them on the subject, they replied that they held the judgment "as collateral security on account of your indebtedness to us. We do not, however, feel disposed to advance any more money," etc. (Letter, Schumacher to Sturm, December 22, 1875, p. 215.)

We shall make a few quotations here from the correspondence bearing upon the injunction suit.

Schumacher, on November 15, 1875, wrote Sturm that the Atlantic had paid the judgment of $48,500 into Court and had brought a suit to enjoin its payment out, and had been granted a temporary injunction. In this letter Schumacher tells Sturm that he has seen *Parsons*, and that "on Saturday he told me if you (H. B. & Co.) assume the assignment from Sturm to you we may be able to dissolve the injunction and then you may get the money in your possession—upon which the suit will then very likely go on amended as against us." (P. 2146.)

On November 17, 1875, Sturm wrote Schumacher deploring the situation caused by the injunction suit, and concluded with the remark: "Here, this matter is very unfortunate for me, as the bank and others depend upon it that I get at least $10,000 into my possession in a few days." (P. 821.)

On November 20, 1875, Schumacher replied to this letter (p. 2147) stating, among other things, that Mr. Parsons would have to have $3,000 on account of fee.

On November 22, 1875, Schumacher again wrote Sturm telling him that Mr. DaCosta had now read the injunction papers. The letter explains the grounds on which the injunction is sought. (P. 2148.)

On November 24, 1875, Schumacher again wrote Sturm saying that Parsons was still demanding money and he thought he would "encourage him with a thousand dollars." (P. 2149.)

On November 25, 1875, Sturm wrote Schumacher, and in the letter discussed the plaintiff's affidavits in the injunction case. He speaks of the Mexican claims and then adds: "Therefore push as much as you can, and particularly see that you get the money. *It belongs to you now*, and what have you got to do with the matter?" He says that he is being censured at home that he did not collect

the assignment through Winslow, Lanier & Co., and concludes by saying: "Now please see that I receive word what is to be done and you receive the money, $48,000." (P. 669.)

On November 26, 1875, Sturm wrote Schumacher. (P. 667.) He says that he has received the complaint in the injunction suit; that rumors are going around that he (Sturm) had turned over all his property to H. B. & Co., and that he is insolvent. "To-day, now, *i. e.* this evening, I have been sued by the First National Bank, and I herewith enclose the paper, which I request you to return. Upon inquiry they insinuated that they had been told that I had turned over the greatest part of my property to you, etc.—too disagreeable to reduce to writing." The letter concludes with a statement of Sturm's present urgent need of money to prevent judgments going against him.

On November 27th, Schumacher wrote Sturm (p. 2150), saying he had delivered Sturm's letter of November 25th to Parsons and DaCosta, and had given Parsons a check for $1,000.

On November 29th, 1875, Sturm wrote defendants (p. 666) that he was in distress for money, that he must have $1,750 by the following Saturday; "$480 I must have to-day, yet, if I will not risk everything, and disable myself entirely, to prosecute the Atlantic judgment. In case a friendly understanding is not reached by this evening, *I shall be obliged to draw on you for* $480, *if only until I can repay you by making a sacrifice, which shall not take long.* I have then at least time until Thursday with the other $1,270." There is much more to the same effect. He concludes with this remark: "*I was going to tell you that I have answered all inquries (for one can not depend on anybody under these circumstances) to the effect that the judgment belongs entirely to you, for value received. Therefore, we agree about this, or I expect your remarks.*"

We now come to the letter of Parsons to Sturm, of November 30, 1875. (P. 347.) Appellant's counsel distort the sense by quoting only part of a sentence from this letter, at page 82 of their brief. The letter, we think, is not set out; it was identified by Sturm upon direct examination. (P. 347.) As appellant's counsel have assumed to quote from the letter, we take the liberty of quoting the whole of the sentence, italicising the part quoted in appellant's brief. It is as follows: "THEY (THE INSURANCE COMPANIES), ALLEGE THAT YOU ARE IN INSOLVENT CIRCUMSTANCES; CAN YOU DENY THAT? *Is it wise to allege that the judgment has been transferred to H. B. & Co.?* THEY ARE RESPONSIBLE PEOPLE, AND IF WE COULD MAKE THE COURT SEE THAT SHOULD THEY SUCCEED IN THEIR CASE THE MONEY WOULD BE FORTHCOMING, *on that ground I presume we could defeat the temporary injunction.*"

This letter, therefore, did not discuss the character of H. B. & Co.'s title to the judgment. It simply said that if the money was to be drawn from the court by H. B. & Co., solvent parties, and not by Sturm, a non-resident whose solvency was at least questioned, the court might the more readily dissolve the temporary injunction.

On December 1, 1875 (p. 3011), Sturm wrote Schumacher, complaining that Parsons still did not write, and saying that he would that night have a meeting with the cashier of the First National Bank.

On December 2, 1875 (p. 664), Sturm wrote Schumacher, saying that he had received a letter from Parsons, and inclosed, to Schumacher, Parsons' letter. Speaking of Parsons' letter, Sturm says: "He inquires about the assignment. "Is it wise to allege that the judgment has been transferred to H. B. & Co.?' *i. e.*, will H. B. & Co. take this position in court and maintain it? Singular; just the point about which I wrote you the other day. I wrote P. that the judgment *belongs to you, and that you can*

do now or leave undone just what you want. I have my value for them. * * * Now I understand the gist of the matter, and I beg you urgently *to consider the whole affair as your own, and 'to claim it.'* It does not concern other people, except at farthest, to extort a few dollars. *I have, up to the present, told every one whom it concerns that I had received from you help and support in money, and I had given you the judgment long ago, verbally, and recently in writing, all of which is so. Therefore, go ahead.* * * * Parsons wants also that I tell him if I can prove it that I am not insolvent. Now, I am not at all so; but if one is hunted with all the hounds, and has ever so many 'goods' and no ready cash, one can still be driven in a corner without being insolvent or even without having many debts. To-night I will consult yet about this, and if you can now help me a little I shall be all safe, and C. and his consorts can mount my back."

Schumacher wrote Sturm December 2, 1875 (p. 2151), saying: "We regret that they cause you all these difficulties, and it always seems to me that all these disagreeable things are stirred up from New York, and that they intend to curb you entirely; as I said before, *we are not able to make any further advances,* particularly to turbulent and incited creditors, as in that case one would follow the other and we never know where it would end. The bank, also, will become impatient if they learn that others are satisfied by us, and will then play out the same trumps. *It is impossible for us to go in any further, as we have now, also, to bear the costs of the new trial. We simply can not do it in these times.*" He tells Sturm if his creditors sue to defend if he can, and if he can not, to take advantage of stay and redemption laws, and adds: *"Now, if it should come to the worst, we are willing to help you with the necessaries of life, but we can not assume the debts! Therefore, do not draw on us!*

"DaCosta seems to take the matter now to be tried with more zeal, as he is preparing to fight. He wishes from us

a statement of the moneys advanced, as your assignment of the judgment of the Atlantic thereby takes quite a different form, as if we had acquired the same on account of former transactions, and the injunction might possibly be dissolved on that ground, even if we have to give bonds for that purpose! Should you have to make thus an assignment of your property, the Atlantic judgment, of course, has nothing to do with it, as it has already been disposed of." In a postscript, Schumacher said if Sturm did not in terms except the Atlantic judgment in any deed of general assignment he might make, he must advise H. B. & Co. in time to allow them to record the assignment of it to them.

On the same day, December 2, 1875, Schumacher telegraphed Sturm: "Letter 29th received this morning. Don't draw. Have written." (P. 2023.)

On December 3, 1875 (p. 2152), Heath telegraphed Schumacher: "Tell Parsons his assets exceed all his liabilities one hundred to one hundred and fifty thousand dollars, not including any claim east. Can furnish strong proof if required." See Sturm's testimony where he tries to defend this dispatch. (Pp. 660-661.) On the same day, December 3, 1875 (p. 662), Sturm telegraphed Schumacher: "Telegram just received. Had already drawn as written. Absolutely necessary. Don't fail to get my letter Sunday" At the same time he wrote a letter to Schumacher (p. 662), saying: "I received your telegram not to draw on you. Why I have only received it to-day I don't know, as it is dated yesterday. But I have marked it at once, 9:10 A. M., and herewith enclose it, that you may see that it is so. I could not help—if I did not want to cause you greater difficulties in dissolving the injunction next week—to put this small matter out of the way. * * * * I can not very well divulge now all our affairs to these people. You must not blame me for having drawn, as I received this, your letter of the 1st

inst., and no telegram. Last night I had a lengthy conversation with several people, in order to prove that I am perfectly solvent, although I am short of ready money. Namely, Parsons wrote me that he could dissolve the injunction if I could prove that, and if you claim the judgment as yours. On the first I drew $480, and last night (which I had already sent off this morning at 7 o'clock), the other $1,270, as I had written you. I am sorry I trouble you so, but it is not my fault, and should you not pay the draft, I do not know where I am, and must request you in that case to inform Parsons to prepare himself, *so that I drop all the other suits.*" There is more to the same effect in the letter.

Sturm followed this with another letter on December 4, 1875. (P. 663.) In it he inclosed a letter to Mr. Parsons which Schumacher was to mail after reading. In the course of the letter to Schumacher he said: I just received your letter of the 2d, *and beg you not to leave me in the lurch. I will make it right in a short time. I do not wish to burden* my debts on you. With the bank, as I wrote you above, I will get along now, but these two drafts had to be drawn in order to clear myself entirely, except the First National Bank. *If the drafts go to protest, I must drop everything.* In my whole life I have not been used to such things, and if I had not been sick at home for three months, it would not have been necessary for me to request you to pay these drafts. I have nothing else that troubles me, but this matter was such that I could not help it."

Schumacher on the same day, December 4, 1875 (p. 823 x.-q. 3106), telegraphed Sturm a night message as follows: "Letters first, second, received. Also telegrams. All shall have attention. Paid draft to-day. Shall get letter Sunday. Stop drawing." This was received by Sturm on December 5, 1875.

On December 6, 1875, Schumacher again telegraphed

Sturm (p. 823, x.-q. 3105): "Telegram, letter, third and fourth received. Draft accepted. Letter follows." On the same day, December 6, 1875, Sturm replied by telegram. (P. 824, x.-q. 3110): "Telegram just received. Two drafts only as I wrote you. All is right here now. More by mail." Schumacher followed his telegram of December 6, 1875, by a letter of that date. (P. 2153.) In it he said: "As telegraphed you this morning, we received your letters of 3d and 4th inst., also Parsons' letter of November 30th, to you, which we return inclosed. Our telegram also informed you that your second draft, one day's sight, had been accepted by us. *Under present circumstances, it seemed to be necessary for your and our benefit, as otherwise all would have been in doubt again, i. e., that which shall help dissolve the injunction. If we did assume these amounts, it was done, we admit it frankly, becasuse it had to be, not that we do not want to help you, no, but then these payments commence to be burdensome to us.*" He further says that Mr. Parsons is still dunning for fees; that Sturm must let no opportunity slip for getting money upon his real estate, and that the letter of Sturm to Parsons, has been handed to Mr. DaCosta, who will mail it.

Sturm also on the same day, December 6, 1875, wrote Schumacher.. (P. 824, x.-q. 3111.) The letter answered Schumacher's telegram of December 4, 1875. In it Sturm said. "This morning at 9:30 o'clock only, I received your telegram of Saturday, *I thank you for the kindness. It was, as I already wrote you, a necessity for our mutual interests; otherwise I should not have drawn them. I hope you will receive the money now soon.*"

H. B. & Co., on December 20, 1875 (p. 825, x.-q. 3112), telegraphed Sturm: "Mail little cash pass-book; will show it to DaCosta." Sturm says he sent the pass-book as requested. (P. 825, x.-q. 3112.) On the same day, December 20, 1875, Sturm wrote Schumacher (p. 685, x.-q. 2100), saying: "I just received the inclosed letter of Parsons, which for good reasons I do not answer until I hear from

you. *I had believed that you have demanded the judgment, as I said, as yours. If that is not so and you have any scruples to do so you must let me know, for I know that the other side does the rest.* I have positive news, that since a fortnight three different persons were in Terre Haute, Indiana, where Mullen lives at present, and that several representations have been made to his family. Of course all this only to influence the man to do something that might be of use to Cleveland, *and if then, after all the judgment should have to be sued for as my own, then I have worked the wrong way for the last three weeks.* I therefore request you to give me information in all haste; at the same time I request you to *keep this letter as well as my letter to you about this matter entirely to yourself*, or let me know in how far you advise P. or DaCosta about it, for otherwise I do not quite know where I am, *in case I should suddenly be asked about something.*"

Parsons' letter sent by Sturm to Schumacher is not set out. Whatever else it may have said, it must have indicated to Sturm that H. B. & Co., would only be able to assert a right in the Atlantic judgment as pledgees of it as collateral security. The letter of Parsons to Sturm of November 30, 1875 (see page 170 of this brief), did not recommend that H. B. & Co. set up actual ownership of the judgment. Sturm alone, as the above-quoted correspondence shows, insisted that H. B. & Co. should take that position. It was this "foxy" letter of Sturm of December 20, 1875, which brought back Schumacher's letter of December 22, 1875 (p. 2153), from which appellant's counsel on page 83 of their brief make a short quotation.

In that letter Schumacher said: "Your letter of the 20th inst., with Parsons' note of the 18th, came to hand at noon. With regard to the latter I have said over and over, that we will assume the assignment and will even give bonds for it, subject to the decision of the new suit. But that is merely a polite phrase. The real thing which Mr. Parsons means is to get another check for $2,000, as I

wrote you before. * * * I have been with DaCosta almost every day, giving him all particulars *about our accounts against you, etc.* * * * * * DaCosta would have liked to set up that the assignment of the judgment was bought by us out and out; but he gave it up, for he found that Parsons had dictated the form, and he himself had telegraphed it to you on or about the 7th of November. *We understand the assignment to be as further collateral security on account of your indebtedness to us,* WE DO NOT HOWEVER FEEL DISPOSED TO ADVANCE ANY MORE MONEY, AND WE THINK YOU SHOULD ARRANGE WITH MR. PARSONS FOR HIS BILL BOTH PAST AND IN FUTURE, AND THAT YOU SHOULD DO THIS FORTHWITH, for our mutual interest will suffer if this is much longer delayed. We judge from Mr. Parsons' letters to you that he will hesitate, if not decline, to do any further work in this matter unless satisfactory arrangements are made with him. WE CAN NOT ADD ANY MORE MONEY TO that which we have already paid out last year. * * * * * Could you not offer some security to Parsons for payment for past services, say in land or lot? Perhaps he might be more tractable, but from us he will ask all the time because *he openly says the more we have paid out the more it is worth to us to recover.*"

Parsons was correct in his "open" statement. Sturm already owed the defendants and the more they paid for expenses in the insurance cases the more defendants were interested in bringing them to a successful issue as one means of recovering the money so paid out. If Sturm is right in his theory here, his counsel (Parsons) was wrong, for the more defendants paid out the smaller their "debt" to Sturm became and in the same proportion would their interest in recovering in the insurance cases become less.

Schumacher, in the letter last above quoted from, candidly and bluntly met the "shady" suggestions of Sturm's letter of December 20, 1875, that H. B. & Co. lay aside their "scruples" and "claim" the absolute title, by his

statement that defendants would undertake to establish that they held the judgment as collateral security for Sturm's debt to them, but that they would not advance any more money or allow the debt to grow.

Sturm, on December 23, 1875, at Indianapolis, wrote Mr. Parsons. The letter is set out at page 687 of the record. Appellant's counsel do not refer to this letter. It shows that Schumacher's letter of December 22, 1875, had then been received by Sturm. In this letter Sturm said to Parsons: "Your letter of December 11th would have been answered sooner but for the fact that I wished to hear from Boker first, as I had no funds to send you and could not answer the other questions myself. I have just received a letter from Mr. Schumacher in which he says that they have assumed the assignment and *will soon give bonds for it, subject to the decision of the new suit* (these italics are Sturm's), and that on Tuesday next the case is to be argued; that they decline to advance any more money at present; as soon as the money is paid over they will, of course, pay you, and have always felt and understood that." After taking Parsons to task for not waiting for his fees until the end of the litigation, as he tells Parsons was the understanding, he continues: "Now that this Atlantic case is finally brought to its present status, where the result is almost certain, *it would be fatal to me* if anything should occur that would interfere in prosecuting to the end at once. The judgment is now Bokers' for value received in full and not on account of a loan, subject, however, to the first payments to Benedict and yourself, which they have assumed to pay out of the proceeds." He urges Mr. Parsons to give his best efforts to aid Mr. DaCosta, and after offering to secure him with real estate, says: "But money I have not, a fact well known to the other side, and hence their anxiety to push matters now, to keep this or any other money from me, and in any other way to injure my credit so I may not borrow any. * * * This

injunction case is all important, the other amounts to nothing, and Bokers will assist me in the new trial if you do."

We have set this letter out so fully because it was respecting a copy of this letter which Sturm enclosed to Schumacher that Sturm was speaking, when he wrote Schumacher on the same day, DECEMBER 23, 1875, from which letter appellant's counsel quote on page 83 of their brief. That letter can not be understood unless read with the letter to Parsons. Sturm's letter to Schumacher is set out in Sturm's cross-examination (p. 686). We quote from it, italicising the part quoted by appellant's counsel: "Inclosed copy to Parsons, *I think I wrote him right.* Just what I think and feel since I received that letter from him I cannot express in writing. *Let me know at once what he will do. In whatever form you bring the suit, it must be satisfactory to me here; however, I can not take any other position now than that the judgment belongs to you and I shall stick to it, for otherwise proofs have to be bought in how far you are entitled to it, and that would be fatal.*"

"Fatal" to whom? This letter does not say. The answer must be gathered from the other letters referred to. Mr. DaCosta, after mature deliberation, had concluded that the Bokers only had a *pledge* of the Atlantic judgment as collateral to Sturm's debt to H. B. & Co., and H. B. & Co. had concluded, upon his advice, that if they should plead in the injunction suit, they would set up their right as pledgee. They did this after Sturm had, as we have shown on several occasions, written them that he was "giving out;" that H. B. & Co. were the absolute owners for value, and after he had requested them to assume that attitude by "claiming" the judgment. If there had been any "*fatality*" to H. B. & Co. in the position of pledgee, which they concluded on Mr. DaCosta's advice, to take, Mr. DaCosta and H. B. & Co. would not have been in ignorance of it.

In the letter to Parsons, Sturm says it would "be fatal

to me," if anything should occur that would interfere in prosecuting the Atlantic injunction to a conclusion *at once.*

The fatality mentioned in both letters was feared by Sturm. There is no evidence that H. B. & Co. shared his fears. Would it have been fatal to Sturm to have the world know that H. B. & Co. were his debtors in a large sum, as he now pretends to claim they were at that time? That was not the fear. Sturm had been giving out that he had *sold the judgment for value to H. B. & Co.* Now to have it appear that he had assigned as collateral and have the proof taken, showing in detail his large indebtedness to them would have been fatal, for then the persons to whom he had made these representations, his creditors, would have known that he was much worse off financially than they had been led to believe.

Sturm was so impressed that this fatality was coming upon him that regardless of Schumacher's direct avowal in the letter of December 22, 1875, that H. B. & Co., under the facts, only had a conditional title as pledgee in the judgment, and would assume none other, he deliberately wrote his own counsel that "the judgment is now Bokers' for value received in full and not on account of a loan," but by other expressions in the letter showed that he would be benefited financially by the collection of the judgment.

We repeat, therefore, that H. B. & Co. all along took precisely the position appellant's counsel, on page 84 of their brief, say they should have taken, and that Sturm alone took and tried to force upon H. B. & Co. the opposite position.

As the issues were never made up (appellant's brief, page 84) in the injunction case, H. B. & Co. took no position in court, but the record shows that they duly credited Sturm upon his bank account with the proceeds of the Atlantic judgment, which was consistent with their title as pledgee of the judgment by way of collateral security. (P.

3166 and p. 83). After reading the correspondence set out above, Sturm's description as set forth in direct examination of the different lines of defense proposed by DaCosta and Parsons, rises little if any above the ridiculous. See his evidence. (P. 347.) Mr. Funke says he has no knowledge of such a discussion or difference of opinion between counsel as Sturm on page 347 relates, but adds "the papers" will show. (P. 2230.)

Appellant's counsel while still considering the "INJUNCTION SUIT," on page 84 of their brief, quote from Mr. Funke's evidence in the case of FUNKE *v.* THE NEW YORK MUTUAL INSURANCE COMPANY, which was tried in March, 1876.

We shall here quote Sturm's examination in chief where he read from Mr. Funke's testimony in the New York Mutual case. (Pp. 348, 349.)

Question 328. "I will ask you if this question was submitted to him on that occasion: 'I want to ask you whether you have any interest in the claim of General Sturm against the insurance companies, except in the policies which were transferred to you.' Was that question asked Mr. Funke on that occasion?

Answer. "That question was asked, and it was answered to by him.

Q. 429. "Was it objected to?

A. (After referring to the printed testimony.) "Yes, sir.

Q. 430. "Upon what grounds was it objected to?

A. "Mr. DaCosta objected on the grounds that the question was put for the purpose of fishing for evidence in the injunction trial.

Q. 431. "But was the question finally admitted?

A. "It was admitted.

Q. 432. "And then I will ask you if the following questions were propounded to Mr. Funke, and if he answered as I shall read:

Q. "What interest is it?

A. "An assignment.

Q. "Of what?

A. "Of one claim against the Atlantic Mutual Insurance Co.

Q. "Except that, have you any?

A. "No, sir.

Q. "Is he not largely indebted to you?

A. "He is, sir.

Q. "What security have you for your indebtedness?

A. "None whatsoever.

Q. "Don't you know that he is not in condition to pay the indebtedness to you, except as he gets money from the insurance companies here?

A. "Not necessarily.

Q. "What means has he to your knowledge?

A. "Real estate in Indiana.

Q. "What real estate?

A. "Pretty considerable.

Q. "Enough to pay your claim?

A. "I think he has, fully.

Q. "Has he represented to you his inability to pay your claim?

A. "He has.

Q. "When has he done it?

A. "He could do it every day if he wanted to.

Q. "You have not been able to get it out of him?

A. "We can not now.

Q. "How much does he owe you?

A. "He owes $32,000 cash.

Q. "That is wholly independent of the consigned goods?

A. "Wholly independent of the consigned goods.

Q. "How long has that $32,000 been accruing?

A. "That has been a regular current account from the commencement of these suits.

Q. "He has been in the habit of drawing on you at will?

A. "He has been keeping his bank account partly with us.

Q. "Have you got his bank account?

A. "Yes, sir.

Q. "Please produce it.

A. "Here it is (producing it).

Q. "Does this contain a true statement of your transactions with General Sturm?

A. "Yes, sir.

Q. "Independent of this business?

A. "Yes, sir.

Q. "And on which he is now indebted to you in $32,000?

A. "Yes, sir.

Q. "I will ask you if those questions were asked Mr. Funke on that occasion, and if he so answered to them?

A. "Yes, sir. Those questions were asked him, and he so answered, as I remember.

Q. 433. "I will ask you whether this testimony was given upon examination-in-chief or upon cross-examination?

A. "This was upon cross-examination.

Q. 434. "After he was served or before?

A. "The day after he was served with the *subpœna duces tecum*."

It will be noticed Mr. Funke said Sturm owed H. B. & Co., "independent of the consigned goods," $32,000 *cash*, and then said the bank book showed "the transactions" of Sturm with defendants "independent of this business," the consignments evidently being referred to. If Funke ever heard that it would be "fatal" to H. B. & Co. if their account with Sturm should be talked of in court he does not give evidence of it here.

Mr. Funke was questioned about his evidence quoted by Sturm from the New York Mutual record (pp. 2230-2231), and said he supposed he so testified, and added: "I want to say, in answer to the question, 'What security had you?,' my answer was, 'None whatever.' I do not exactly understand that, and I can only say that that question could not have been understood by me. The answer given is certainly wrong. The proper answer is, I ought to have said that we had real estate and all his life insurance policies as part of the security, outside the Atlantic." (Qs. 500, 501 to 506, p. 2231.) On cross-examination, Mr. Funke said he thought there must be a mistake in the

answer "none whatever," attributed to him. (Pp. 2367; q. 1985.)

Appellant's counsel on page 84 of their brief say on cross-examination Mr. Funke "admitted that he had testified in that case (New York Mutual), that Sturm's indebtedness to his firm was $32.000." This is an unfair statement of the evidence. Funke was being questioned as to whether he had testified as the record in the New York Mutual case showed. That record (see Sturm's direct examination here, p. 348) showed that Funke said Sturm was "largely indebted" to H. B. & Co., and upon his bank account, "He owes $32,000 cash," "wholly independent of the consigned goods;" and that being requested he produced the bank account to show it.

SETTLEMENT OF MAY 1876.

Under this title appellant's counsel in their brief (p. 85), charge that defendants deceived Sturm respecting the time when defendants received the proceeds of the Orient, New York Mutual and Atlantic policies, compromised in May, 1876. These moneys were received by defendants, May 23, 24 and 25, 1876 (p. 2,567). On page 90 of their brief, appellant's counsel assert that Sturm learned "that these collections had been made by defendants" in July, 1876, when Heath returned to Indianapolis from New York.

The evidence establishes that Sturm was not deceived as charged and that he in fact knew on May 25, 1876, that all these collections had been made.

The settlement with the three insurance companies was negotiated by Mr. DaCosta for H. B. & Co. and by Mr. Parsons for Sturm (Sturm in chief, qq. 450–454, p. 352; x.-q. 1607, *et seq.*, pp. 608–611; Schumacher qq. 303–305, p. 2841; Funke, qq. 351–356, p. 2217). Sturm was in Washington on May 22, 1876, and on that day his friend Allen, telegraphed him three times that a settlement of the three cases had been arranged and his presence in New

York on the morning of May 23, was essential. The telegrams are in the record (p. 352, 315). Sturm said in direct examination that in response to these telegrams he went to New York, leaving Washington on May 22 (q. 239, p. 313); that he left New York for Washington on the evening of May 25 (q. 461, p. 353). The record shows that while Sturm was in New York, May 23 to May 25, 1876, he was present at frequent consultations with Parsons and DaCosta, one of which was on the first day he was in New York and another on the last day (pp. 608, *et seq.*, x.-qq. 1,608 to 1,629).

On page 2217 Mr. Funke says that on May 23 his firm received $28,000, and on the 24th $12,000, and the ballance of the three collections on May 25, 1876; that on May 24 and 25, certainly, and probably on May 23, Sturm was advised that H. B. & Co. had received this money; that Sturm knew as much about the settlement and the collections as he (Funke) did at the time they were made; that Sturm was present in consultations with H. B. & Co. and the respective counsel, and joined in mutual congratulations over the collections. (Pp. 2217, 2218, qq. 351–359; see also Funke, pp. 2233, 2234.)

Mr. Schumacher, on page 2841, says that Sturm was in New York on May 25, and on that day knew fully about the settlements that were made; that he then knew that the money had been collected and credited to his account, and made no objection; that he then had as full knowledge on these subjects as he (Schumacher) had, if not more; that Mr. DaCosta's report of the last collection, the Atlantic, with a check for the balance, was received before 3 o'clock in the afternoon of that day, and on that day the check was deposited in the bank by H. B. & Co.; that Sturm saw Mr. DaCosta's letter and report on that day, and that the report so seen by Sturm is the same paper of which Sturm, in his letter of June 20, 1876, asked for a copy. (Pp. 2841, 2842, qq. 303–315.)

On June 20, 1876, Sturm wrote Schumacher a letter, which is set out in Sturm's cross-examination at page 834. After leaving New York on the evening of May 25, 1876, and up to the day this (June 20, 1876) letter was written, Sturm had neither seen nor had a communication from the defendants. The complainant has copied parts of this letter in his brief, at page 87. As this copy is not entirely accurate, and the omitted parts have a bearing upon some questions here in dispute, we here set forth the whole letter as taken from Sturm's cross-examination at page 834.

X. Q. 3161. "Did you, on June 20, 1876, write a letter to Mr. Schumacher? I submit to you an English letter purporting to have been written by you to Mr. Schumacher June 20, 1875, which I assume should be 1876 (handing witness the letter). Look at this letter and state whether the date should not be June 20, 1876.

A. "Yes, sir; that should be 1876. I wrote that letter.

X. Q. 3162. "Will you make a copy of that letter a part of your answer to this question?

A. "Yes sir; a copy is as follows:

"'INDIANAPOLIS, June 20, 1876.

"'MY DEAR SCHUMACHER—I wrote to Funke on Sunday last that I had safely returned, and that I would write you as yesterday in regard to the claim of the First National Bank here, etc., but I have been kept in hot water ever since, so I could not get a chance until now. Everybody is pressing me now for payment, and more especially the bank, who have obtained a judgment against me, and somehow are laboring under wrong impressions altogether as regards the payment of the insurance claims; but no matter, I have to do something at once, and although it was my wish not to trouble you until we could hear of a settlement with some more companies, I find it best to arrange immediately all I possibly can. Now, will you and Funke please consult and then inform me by telegraph how far you can assist me *now, without regard to any other of the insurance suits*, all of which I propose to settle without suit, if such is possible, even at a low figure, rather than go to further expense and trouble. It is abso-

lutely necessary for me to arrange some matters here at once, and thus save unnecessary heavy costs and expenses, and I shall have to draw on you to-morrow for some money, as little as I possibly can until I hear from you, but that bank claim, with accrued interests and the costs, I must provide for, as they regarded it as if they had a moral lien on the proceeds of the Atlantic case. Times here are worse than I ever anticipated, and meetings have been held to provide employment to laborers, etc., who have actually threatened a riot. Business is flat, and no money at all they say. I sincerely hope that things will improve after if not before the elections.

"'Allen will have told you about the nomination in Cincinnati, which, though not my first choice, may virtually turn out still better, as it is a foregone conclusion that Morton will be Secretary of State in event of success of Republican party.

"'I saw Bluford Wilson several times in Cincinnati, and he will attend to your matter on return; but as B. has resigned and something might make him forget it, I have by this same mail written to Wilson calling your matter to his mind, and I hope that it will be all right this month yet.

"'Please have Mr. Rabing send me the pass book and copy of the lawyer's statement so I can get my own papers, etc., straightened out. Col. Wood has been very saucy and wants money to which he, like some others, is not entitled, but thinks now is a good time to strike me for a stake; but I pay no attention to any of them, but shall make out a schedule of the moneys which I have already paid out to Col. W., and then call to his mind that when I wanted him last February in the U. S. Lloyds case he refused to come unless I planked down $500, and the case had to be dismissed, as I had no evidence ready. If I can only get the other cases off some way at any reasonable figure, I shall have my own quiet revenge on some of those blackmailers yet. Please write me at once and oblige

"'Your friend, H. STURM.'"

This letter shows that Sturm had not received his pass-book on June 20, 1876; it shows that he knew that "the lawyers" had made to Bokers "a statement" which Sturm wished to use with the pass-book in getting his "papers

etc., straightened out." Sturm does not explain how he knew that the lawyers had made a report. He testifies, as his counsel say, that he did not know of the collections until in July 1876. (P. 377, q. 641.) He had no reason to suppose that the lawyers had made a statement before they had received the money. We submit, this letter shows that Sturm knew in May all that Funke and Schumacher testified he knew.

In cross-examination, when Sturm claimed such ignorance of these collections, his attention was called to the fact that his pass-book, under date of May 25, 1876, showed a credit to him of $22,311.11, just the balance received by H. B. & Co. from the Atlantic collection. He says that he received the pass-book, with this credit upon it, some time in June, 1876, and that when he saw the credit he did not know what it was for. "*I supposed it was the credit for the lots, because it was the amount that we figured out, and as it said nothing about it I thought they might have sold the mortgage notes and one thing and another and given me credit for the amount, which was about the amount that they owed me on the six lots.*" (Pp. 733, 734.) In chief Sturm testified that Heath brought him from New York, on July 1, the copy of the lawyer's statement of the collections, which was the first knowledge he had that the credit on his pass-book, dated May 25, was from insurance collections. (Pp. 377, 378.) He says, in answer to question 629, in chief, page 377, that on June 24, 1876, he wrote the letter set out on page 376 of the record, and that when that letter was written he had not received his pass-book, that it came to him on June 26. In answer to questions 630 to 633, page 377, he says that on the day the pass-book came, June 26, he received a letter from defendants dated May 24, and that on the day before the book came, May 25, he had started Heath for New York.

It follows from the foregoing that Heath was not in In-

dianapolis between the time Sturm received his pass-book and the time Heath delivered, as Sturm claims, the copy of the lawyer's statement on his return from New York. Yet Sturm in cross-examination, page 736, cross-question 2504, *et seq.*, said: "I know *we* figured it over two or three times," referring to the figuring about the Indianapolis lots as connected with the credit of May 25, 1876. In answer to his own counsel, on the same page, he says by the word "we" he means himself *and Mr. Heath.* On the same page he says that he does not recollect what day he and Heath did this figuring. "It was after I got my bank book." Heath was in New York on June 28, for on that day Sturm wired defendants to arrange with Heath for some money for Sturm's personal use. (P. 736.)

It is apparent that Sturm does not tell the truth about this matter; he and Heath could not have had this discussion of the source of this credit as Sturm testifies they had. He was not deceived about the collections, and his letter of June 20 shows that he was not, and corroborates Funke and Schumacher when they say that Sturm was present when the money was collected and knew all about it.

BANKRUPTCY.

Complainant's counsel assert that about June 22, 1876, defendants "renewed" their efforts to induce Sturm to go into bankruptcy.

The record does now show that the defendants before June, 1876, even advised Sturm to go into bankruptcy. The only discussion about Sturm's going into bankruptcy, prior to that time, was occasioned by Sturm's letter of September 15, 1875 (p. 357), in which he said he would probably be forced "next week to make an assignment." Boker went from New York to Indianapolis, June 17, 1875, in response this letter, and Boker, Heath and Sturm concur in saying that Sturm then told Boker that he did not intend to go into bankruptcy or make an assignment,

and concur in saying that Boker expressed pleasure upon hearing the remark, and Boker's letters from Indianapolis are to the same effect. (Pp. 2469–2471.)

On page 88 of their brief, appellant's counsel consider some letters of June 22, 1876, from defendants and Wm. H. Allen to Sturm, and attempt to charge defendants with Allen's statements as though Allen were their agent. Allen was *introduced* to the defendants by Sturm early in 1876 as an agent and assistant of Sturm's in the insurance cases. (Schumacher, p. 3018.) Mr. Schumacher testified that H. B. & Co. had nothing to do with the employment of Allen, and that they did not advise his employment. (P. 2878). On page 2126 Mr. Schumacher further says that he became acquainted with Allen "in the beginning of 1876 in our store, just when he was *introduced to Mr. Boker as the agent for General Sturm.*" Asked in what business Allen was at that time, Mr. Schumacher further said: "He had no fixed employment so far as I know. He offered his services to General Sturm in this insurance litigation. I do not mean that he offered his services positively. I mean that Mr. Allen was the agent for General Sturm in the insurance cases, and I knew that, because he acted for him—he was introduced to us as such. General Sturm said, 'I am sick, and have to go away, and will leave Mr. Allen here and he will attend to my business, and you will pay him the moneys he needs for my account, and that is all;' that is the substance of it, 'and I hope you are satisfied with that or him.'"

Mr. Boker testified (p. 2108) that he became acquainted with Allen in the spring of 1876; that he had seen him with Sturm a few times before that (p. 2118); that he does not know what business Allen was then engaged in; that he met him first at their store with General Sturm; that General Sturm brought him in one day "*and introduced him to me, and then he said that Mr. Allen would attend to his business; that Allen was in New York, and that he would*

attend to it, and if Mr. Allen wanted any money from us, that we should give it to him on his account, that is, Mr. Sturm's account;" that the business Allen was to attend to for Sturm was *in the insurances cases generally;* "he did not limit it at all—he attended to his entire business here; that he was his right hand man; that is not the conversation with him, that is only the substance." (P. 2109.) In his deposition of 1884 (p. 2466), Boker further said that he had no knowledge that Allen was employed by the advice of H. B. & Co.; that he was introduced by Sturm, and he principally attended to hunting up witnesses; "in fact he attended to Sturm's matters."

Mr. Funke (p. 2236, q. 566) says that he has no knowledge that Allen was employed by H. B. & Co. (p. 2273, q. 965); that he knew Allen first in 1876; "he came in with General Sturm. General Sturm brought him into the store, and they were in the office. I had never known him before. I take it for granted that it was in the spring of 1876, as General Sturm states. At any rate, I think it was in the year of 1876." Being asked for what purpose Allen was introduced, Funke replied (q. 967, p. 2274), "He had to represent Sturm in some of his matters, such as getting witnesses for him, etc. That is all I know about it." Asked how much he saw of Allen after that, Funke answered: "Well, I saw a good deal of him. He used at that time, or later, to go in and out every day or so, and now and then every day. He came asking about General Sturm's business matters, letters, etc., and one thing and another. We had no other business with him except in some private matters he attended to for us, such as going over to Washington." (Qq. 968–971, p. 2274.) In answer to question 972, Mr. Funke said that Allen was never engaged or employed by H. B. & Co. in connection with the insurance business.

In answer to question 1030 (p. 2279), in which he was asked whether Allen had ever acted for H. B. & Co. in adjusting any of the insurance claims, Mr. Funke replied:

"He acted as the agent of General Sturm, but not for us;" that in the correspondence between Allen and Sturm, Allen was acting for Sturm and wrote of his own motion, and not at defendant's request. (Qq. 1031–1032, p. 2279.)

The three letters of June 22, 1876, referred to in appellant's brief (p. 89), are set out in the record as follows:

Allen to Sturm (p. 122).

Schumacher to Sturm (p. 220).

H. B. & Co. to Sturm (pp. 123 and 220).

The three letters are as follows (from Allen's testimony, page 122):

"Office of Herman Boker & Co., 101 and 103 Duane and
"91 and 93 Thomas streets.
"NEW YORK, June 22d, 1876.

"Please address letters P. O. box 2347.

"DEAR STURM—Yours received this morning and contents noted, and will attend to same. Messrs. H. Boker & Co. have written you this day a business letter, which, of course, you can show the First National Bank, who, according to your letter, will press you for money; if you have not turned all of your real estate out of your hands before this you have been very foolish, for you must expect to be annoyed by every one to whom you ever owed or promised a dollar, and the quicker you face the music and have nothing, the quicker you will have *peace* and rest. Of course you know why H. B. & Co. write this letter, as it is to help you lighten your burden by a good excuse; I shall send you, as soon as possible, a full statement of press matters and all expenses incurred, etc., and also all the notes of Naltner that I control, also those that Bokers have, which will make your claim against Naltner much larger; I had sent Robert only $100 and did not receive any letter acknowledging receipt of that until I arrived from Cincinnati. Hoping you can fix up all your outstanding matters in good shape for yourself, I remain

"Yours truly, "WM. H. ALLEN.

"P. S.—You had better send to Boker's the letter that they wrote you on November, which you showed to the bank, in regard to securing them, as it will be better for you not to have it. "WM. H. A."

Sturm and Allen had gone together from New York, via Washington, to the Republican convention, at Cincinnati, early in June.

(From Sturm's testimony, page 220.)

"NEW YORK, June 22d, 1876.

"DEAR FRIEND STURM: I received your letter of the 20th inst., and I am well aware of what I wrote you on November 29th about the claim of the First National Bank. We were at that time expecting that the Atlantic judgment would be paid in full, which would have brought about fifteen or twenty thousand dollars more than we finally received, and I don't see how we now, as there is but little prospect of settlement with the Great Western, and the Baltimore companies are also in statu quo, shall take upon ourselves this bank claim. We have therefore sent you a business letter which you can show the bank. You need not now consider yourself under such obligations, as the bank, in spite of your promise, has obtained a judgment against you. I have not much time to-day to write—would like, however, to call your attention to the fact that Mr. Allen gives you some prudent advice, by following which you will obtain great relief."

"(Signed) FREDERICK SCHUMACHER."

Now, between the word "relief" and the signature of "Frederick Schumacher" there are some other words not referring to this matter, and I have left them out. They can be marked by stars.

Q. "Now go on with the one inclosed in it.

A. "The next is the business letter that Hermann Boker & Co. inclosed. It reads as follows:

"NEW YORK, June 22d, 1876.

"General H. Sturm, Indianapolis:

"DEAR SIR: Your two letters directed to Mr. Funke and myself, dated June 20th, came duly to hand, and contents have been duly and carefully noted. In reply, I beg to say that we were surprised, on overlooking and examining your account, as requested, we find that your indebtedness to us amounts to such a large amount, and that we must necessarily request you to secure us in some way for its payment. You are well aware that the Atlantic Insurance Company and others paid less than 50 per cent. of the amount due, and it is under these circumstances that the debit against you has become so large. We have advanced you all the necessary moneys and lawyers' fees to carry on the suits and other matters, and had no idea at the time we commenced to get in so largely, but we have paid it

and feel now that we ought to be secured first. Therefore, please take some steps to carry out our wishes in this matter at your earliest convenience, and you will oblige

"Yours truly, HERMANN BOKER & Co."

Sturm's letter of June 20, 1876, answered by these two letters of the defendants, is copied in full on page 165 of this brief.

Allen, on June 23, 1876, followed up his letter with a telegram, which would reach Sturm in advance of the letter. It read: "Will write to-night personally, explaining letter sent yesterday." (Q. 53, pp. 125 and 354.)

Allen (p. 125) sets out a copy of his "personal" letter to Sturm, dated June 24, 1876, reading as follows:

"'NEW YORK, June 24, '76.

"'DEAR GENERAL—Your telegrams and letters are all received and I will explain within all letters already written. Mr. Funke and Mr. S., I feel confident, are put out about advancing more money to you for the purpose of paying your back indebtedness, and think they are really acting more friendly to you by so doing. They say you said something about drawing a draft in your last letter but you never named any amount, and to-day they had a draft presented to them of $1,650, drawn by Heath and accepted by you, which they have let go back. My idea is, and I know I am correct, that H. B. & Co. will not advance any moneys to pay your indebtedness, and think that you ought to come right out and face the music, and tell every one that the insurance company paid only about 50 per cent., and that the advances made by them amounted to a great deal more, and they would not advance any more now, and so you could not pay anything, and that if you got your Mexican claims through you could pay them, and so think also that you should get everything out of your own name, so that no one could touch your property. I feel confident that if you needed any small amount for yourself that it would have been paid, but to pay your past due indebtedness they will not do. I have attended to all that you asked me to do. I have written you a plain statement, in my opinion, of how H. B. & Co. think.

"'The Baltimore Company have as yet made no offers whatever, and as yet can not tell you anything. The

Great Western will do nothing before October, if they do then, as they say it can not be reached in law until that time, and they would be losing interest by paying it now. I am now disappointed, General, the way things turn out, as I have told you before. Now, my own opinion is for you to look out for No. 1, as I have told you often before. I know H. B. & Co. will help you privately, but will not pay any moneys on notes overdue, etc., and think you had ought not to ask for it. According to their account you owe them still large amounts. I have not seen Peckham yet, and Sunday I will write out the matter for Naltner, but I can tell you, General, I am a sticker and a good friend to you, and shall stand by you. I wrote you yesterday in B. & Co.'s office, and, of course, they saw the letters, so you can understand the tone. I have argued in your favor, but F. is much harder than S., and I really think S. would have paid the last draft if it had not been for F. Still it will turn out as I told you. Give my regards to ladies and friends, and believe me ever.

" 'Your true friend, W. H. ALLEN.' "

Allen, without saying so in so many words, wishes, by his testimony, to convey the impression that he showed even this letter to defendants. (Q. 59, p. 126.) He says he wrote his other letter (June 22, 1876), at H. B. & Co's. instance, and that he "showed them the letter;" that they talked Sturm's affairs over, and that he, Allen and H. B. & Co. thought Sturm ought to go through bankruptcy, and it was thought best that Allen and defendants should write Sturm, so advising him. (Pp. 122, 123.) Allen says he drafted the letter of June 22, 1876, signed H. B. & Co., and that it was written at his suggestion, then changes his answer and says he drafted it at H. B. & Co.'s instance. He says Mr. Schumacher copied the letter from his, Allen's, draft of it, and that he has and produces the original draft, the opening part of which he says is in Mr. Schumacher's hand writing; that Mr. Schumacher, after starting the letter, asked him, Allen, to write it and "word it as a business letter" for him; that he, Allen, was there when Schumacher copied this letter, when Schumacher wrote

and personally signed a letter to Sturm in German, a language he, Allen, did not understand, and that he, Allen, enclosed the three letters in an envelope to Sturm. (Pp. 123–125; qq. 26–52; also p. 121.)

Allen, on June 24, 1876, wired Sturm as follows: "B. will not pay any more drafts now, so don't draw any. I write." (P. 354.)

Sturm, on June 24, 1876, answered defendant's two letters of June 22, 1876 (p. 376), as follows:

"Private.

"INDIANAPOLIS, June 24th, 1876.

"MY DEAR FUNKE AND SCHUMACHER—Your 2 letters of 22d, as also one from Allen, I have just received, and have telegraphed Allen at once to write me fully, as I do not understand you clearly. I can only *imagine* your views, but fear that you have misunderstood my position. The judgments and debts which I have here are honest & just, and must be paid before July 1st, for my whole property is responsible therefor, and if that is sold, I have only to pay about 25 per cent. costs additional, for that much it will amount to at least with Sheriff's fees, etc., and I am then completely powerless to carry on any business here, and nothing remains for me but to establish myself somewhere else, which will then be very difficult indeed. The plan Allen proposes, does me no good against honest Creditors, for rather than place myself in any such false position, everything shall be taken from me. But if I can prove myself just & honest towards them, I shall do everything to protect myself against false claimants. This was indeed my hope, that I would be able to do this, when the last settlement was made. The only right course for me, is to obtain the necessary money from any one and to secure him then with my property. This is not easy to do for I can not trust it to a stranger.

"To you I am willing to assign everything I have, as 'consideration' 'for advances' or whichever way you think best, if you only can, and have no other scruples. But as I said, the honest debts here must first be paid and that soon, for otherwise I can not defend myself against others and stand here exposed as a scoundrel and my whole life is ruined. Should I have correctly understood your letters

& the one from Allen, and you would be willing to help me in such a way, I can be clear very shortly & you hold my property as security. I might then, if necessary, come to you upon receipt of a telegram, or my son in law, A. B. Heath, can represent me there by Power of attorney, which, perhaps, would be the best under existing circumstances. My Property is all in real Estate, which is very valuable even under present circumstances, but just now is no time to sell it, and I can not assign it to any of my own family. Consider this now at once and telegraph me in such a way that I can understand the sense of your words. I would have waited with this letter till Monday, but the time is getting too short, and before I hear further from Allen it might be altogether too late.

"In haste yours, H. STURM."

On the same day, after receiving Allen's telegram, Sturm wrote the following letter (p. 241):

"INDIANAPOLIS, June 24, '76.

"Messrs. H. Boker & Co.:

"GENTS—I wrote you a long letter to-day, explaining my views as fully as I could in a letter, but this afternoon I received a telegram that the draft for $1,650 had been protested, and one from Allen not to draw any more on you. Fearing that there is some misunderstanding regarding all my matters and my own position, and as I have but a few days left in which to do anything to save myself, and as I can not leave myself now, my son-in-law, Mr. Heath, has concluded to leave for New York to see you personally, as letters can not convey ideas as clearly and quickly as a personal conversation.

"I beg you, now, to give Mr. Heath your *entire confidence* in this matter appertaining to myself, just as you would to me. If there is any hope of doing anything to help me out of my difficulties, Mr. Heath will aid with all his might in the matter, and he understands my position and financial affairs fully and almost better than I do myself. Please to tell Allen to do the same with Mr. H., and I hope that he will not return without some encouragement for me. Yours truly,

"H. STURM.

"P. S. It was so late when the telegram arrived, and Mr. Heath concluded to go on, that I could not give him a power of attorney further than this letter, but I will stand by whatever he does for me.

"Yours, H. STURM."

Heath testified that he delivered this letter in New York to Mr. Schumacher (pp. 1252, 1280, 1281); that he, on going to New York, first went to see Allen, and Allen went with him to defendants' store. (Pp. 1280, 1281.)

It will be seen that every one of the letters of H. B. & Co. written after Sturm left New York in May, 1876, including the two of June 22, 1876, was in perfect accord with the entire correspondence up to that time. They all told Sturm in some form or other that they had advanced him money, that he was owing them, that they would help him, as friends, with some money for the necessaries of life rather than see him suffer, but they would not pay his drafts any longer or accommodate him with money to pay his old debts.

On that day, June 24, 1876, H. B. & Co. wrote Sturm as follows: (P. 2131.)

"NEW YORK, June 24th, 1876.

"General H. Sturm, Indianapolis:

"DEAR SIR: A draft is presented to us for payment made by Mr. Heath on you, accepted by you to the care of H. Boker & Co., for sixteen hundred and fifty dollars, which, of course, we did not pay, and had to let go back, having no funds of Mr. Heath in our possession AND FEELING NO INCLINATION TO INTERVENE FOR YOUR ACCOUNT.

"Yours very truly, HERMAN BOKER & Co."

The next communication was a telegram from Sturm to H. B. & Co., dated June 28, 1876 (pp. 2129), reading: "You must necessarily assist me with something for personal. Arrange this, at least, with Heath."

JULY 4, 1876.

The visit of Heath to defendants having failed to get more money out of defendants, and hope of any further considerable financial favors from that source having been given up by Sturm on July 4, 1876, he wrote his "declaration of war" (p. 378), as follows:

"INDIANAPOLIS, July 4th, 1876.

"Messrs. Herman Boker & Co.:

"GENTLEMEN: My son-in-law, Mr. Heath, returned last Saturday morning and informed me that after all the explanations he has made to you of my necessities, you still refuse to furnish me even a small amount of money, which I sorely need for personal expenses of myself & family. From the conversations he has had with you he has formed the impression and believes that you intend to hold me responsible for the full amount of your bill for arms, etc., furnished, and *besides* you do not make any allowance for my time and trouble in prosecuting *your* cases nor bear any portion of the expenses of this litigation. A man suddenly dropped from the clouds could not be more surprised than I am, for I have never for a moment believed that you could or would entertain such an idea. On the contrary, although repeatedly & urgently requested some years ago by true friends and advisers to insist on a settlement with you before the cases were finally decided, I declined to do so *then*, as I thought it would be unfair in me to take advantage of the situation I was in at that time. On the contrary, I have always endeavored, and to my detriment, as it has since proved, to give your cases the preference, and when it became necessary for me to overdraw my account with you, to enable me to continue the litigations, as my own cash means & those of my family had been exhausted, I offered to secure you with all my property, if necessary, AND I HAVE GIVEN YOU HEAVY COLLATERALS FOR SUCH ADVANCES, AND TO SECURE YOU AGAINST LOSS IN CASE OF MY DEATH I HAVE INSURED MY LIFE IN YOUR FAVOR FOR THE SUM OF THIRTY THOUSAND DOLLARS, with the understanding that these policies should be transferred to my wife when a settlement should be had on the winding up of *your* cases. From the many conversations I have had with you, I have always been led to believe, and did believe, that we were fighting for something else than mere money *only*, and I have never attempted, but always declined, to effect any compromise for my own account merely, unless you also were benefitted thereby, and when, few weeks after the non-suit (by Judge McCunn), Mr. Parsons was offered a settlement with the Great Western Co., and you declined to accede to the terms (which were auch better than we have since obtained), I assured Mr.

Parsons that you would deal fairly with me whenever your own cases were decided, that I so understood you and so believed, and that you would credit me with a full proportion of my expenses, etc., on account of your own litigation and policies.

" ' However it is needless to go further into detail just now, the whole subject is too unpleasant for me to dwell upon. I have waited patiently, since Mr. Heath's return, for a letter from you, which would explain to my own satisfaction your present conduct, and confirm my own belief in your friendship for me, but in vain. I am at present without means even to provide the necessaries of life for my family, and your sudden action, which is both unaccountable and uncalled for, in refusing me any assistance whatever, stops me entirely from arranging a settlement of my affairs with my honest creditors without recourse to law, and thus avoid the cost of foreclosures of mortgages and litigation, and it behooves me to call your attention to the necessity of an immediate settlemet of our accounts.

" ' This is the more necessary, *for your own sake*, as I do not see how I can avoid entangling you in some way in my suits, unless we have closed our affairs entirely *to date.*

" ' On looking over the past, I am conscious of the rectitude of my motives and of entire fair and honorable dealing with you, and I propose, that whatever new difficulties present themselves or whatever unpleasantness may arise in consequence of your present action, the whole responsibility shall rest where it properly belongs: *with you.* I am entitled to your confidence, and if you have any ulterior object (which from your letters and from Allen) is designed for my benefit, you ought to inform *me* fully and not leave me in doubt and uncertainty. I wrote you last week before Mr. Heath's departure and you, of course, understand my anxiety to maintain my reputation as an honest man by dealing fairly with every man, and I told you then what must be done to enable me to settle with honest creditors, and I shall not back down from that stand one inch unless, of course, the law steps in and forces me to do otherwise. Nevertheless, I shall have to give a statement to my creditors of all my claims against every person, which will, of course, include any demand or claim I may have against you, or *may believe myself entitled to recover from you.*

Now you will see where this will lead to or may lead to. As long as we have no definite *final* settlement I do not see how I can do anything here without dragging you in. So I beg you again to carefully read this letter and study its object, for I have written it as carefully and with as much forethought as I could, to give you my full idea and with no intention to conceal or deceive. Necessity, as you well know, however, knows no law, and it is to your interests, as well as to my peace and comfort, that you reply at once, stating what you will do. To enable you to come to a definite conclusion I submit the following statement:

September 18, 1867, your Bill for Arms, etc...	$39,887 60
October 18, 1867, your Bill per Wilmington...	10,175 00
Total	$50,062 60

Policies delivered to you:

On Keese, Sun Mutual.....	$12,500 00
On Keese, New York Mutual	12,500 00
On Keese, Orient Mutual	15,000 00
On Keese, Mercantile Mutual	15,000 00
On Blonde, U. S. Lloyds.....	15,000 00
On Wilmington, by yourself.....	? ? ? ? ? ?
Total	$70,000 00

Receipts by you, *net:*

May 4, 1870. Cash as per Pass book.....	$2,000 00
June 11, 1870. Sun Mutual Insurance Co.....	11,686 25
June 20, 1870. Cash gold as per Pass book $4,000	4,452 50
July 12, 1870. Mercantile Insurance Co.....	15,768 78
May 28, 1876. Orient Insurance Co.....	15,483 81
May 28, 1876. New York Insurance Co.....	12,903 00
Total received	$62,294 34

leaving a surplus of $12,231.74 over invoice cost. Both the Keese and Blonde met with an accident over which I had no control, and all the expenses of the litigation consequent upon these losses have been advanced by me. As nearly all of these expenses have been paid through your

house on checks, etc., which amount to a very large sum, I can furnish you the vouchers if you want them. All the amounts which I have received from the companies have passed to my credit through your house, and you can best tell how much it is after correcting errors in my pass book account of which I speak in another letter to-day.

"'You are thus enabled to come to some immediate conclusion as to what amount you consider a fair equivalent for my trouble and expenses in the matter, and I hope you will send me a proposition of settlement in full to date without loss of time.

"'The four policies which are still undecided I shall probably instruct Mr. Parsons to settle in the best way he can, without loss of time, but with a view only to close out this litigation, as I see clearly that I will not be able to enforce their payment by continued lawsuits, which cost me more than I will ever receive from them.

"'In conclusion, let me repeat, that whatever unpleasantness this letter may create, it is not through any fault of mine; I am nevertheless in full earnest, and desire an immediate understanding before it is altogether too late.

"'Yours truly, H. STURM.'"

On the same day, July 4, 1876 (p. 736), Sturm wrote the defendants another letter as follows:

"GENTLEMEN—I have received the pass book with the last vouchers, also a statement of moneys received from the insurance companies through Mr. DaCosta. In this account you have charged me with the full amount paid to Parsons, viz., $4,800.14, whereas you have already charged $3,000 on my pass book. Please correct this, as also the bill for printing machine, which I find you have charged first in Remington's bill $50, and then again by mistake in a separate slip voucher as $75, only one of which can be correct. There is also an old charge of $250, March 5, 1870, against me, which ought to be corrected now. Mr. Rabing will remember this; it arose out of an erroneous charge, but we left it until he could be sure that no such check had been presented at your bank. Be pleased to correct this and advise,

"Yours truly, H. STURM."

On July 7, 1876, the defendants (p. 737) wrote Sturm as follows:

"NEW YORK, July 7th, 1876.

"Gen'l H. Sturm.

"DEAR SIR—In reply to your favor of the 4th inst., regarding errors in pass book, we beg to say that we paid Mr. Parsons the sum of $3,000, and Mr. DaCosta charged us $4,800.14 — in all, therefore, $7,800.14, and not $4,800.14. The charge for the Writing Machine we do not understand; according to our ledger, we have only charged you with $75, which we paid on April 1st, according to our check book. It can only be an error in the vouchers. A draft of yours, which has up to the present date not been presented to our bank (although we accepted the same), amounted to $100 (not $250), and was charged to you in March, 1874; this amount we will pass to your credit. We have requested Mr. Allen to explain the matter. "Yours very truly,

"HERMANN BOKER & CO.
"JOHN RABING."

On the same day, July 7, 1876, defendants wrote Sturm another letter (p. 738) as follows:

"NEW YORK, July 7, 1876.

"General H. Sturm, Indianapolis:

"DEAR SIR—In accordance with your request, we beg to inclose our statement of merchandise account, with interest added to July 1, 1876, and amounting to $46,464.41 in our favor, which we trust you find correct. We also inclose our statement of cash account, showing a balance due us of $23,044.24 per first July. Please send us your pass book, that we may balance the same up to the first inst., and oblige, Yours truly,

"HERMANN BOKER & CO."

Appellant's counsel, in their brief, on page 91, say, speaking of Sturm's letter of July 4, 1876, "The they did not have the courage to answer by letter." This letter of July 7, sending Sturm statements of his cash and merchandise accounts was the ANSWER.

THE WITNESS ALLEN.

Appellant's counsel seek to charge defendants with the improper and dishonest advice given by Allen to Sturm in Allen's letter of June 22, 1876, viz.: the suggestion that Sturm should make way with his property to defraud his creditors. We have shown such advice was at discord with all letters from defendants themselves.

Allen testified that he wrote the June 22 letter after discussing Sturm's affairs with defendants (p. 121, q. 7); that defendants told him to advise Sturm to go through bankruptcy. (Pp. 141, 142.) These talks were with Funke and Shumacher only, for Boker was in Europe from April 8, 1876, until September 29, 1876. (P. 2100, qq. 28, 29.)

Funke testified (pp. 2275 and 2373) that Allen wrote on June 22, when defendants were writing to Sturm for the reason that Allen was on terms of intimacy with Sturm; that one of the things discussed was whether going into bankruptcy was the best mode of relief for Sturm; that defendants had no interest in his doing so except a friendly personal interest in Sturm to see him free of embarrassment and able to personally, at Washington, attend to his and defendants' Mexican claims; that he did not read Allen's letter of June 22, 1876.

Schumacher testified that he did not read Allen's letter: "Mr. Allen may have communicated what he supposed he had written *or what I should suppose was what he had written* to General Sturm, but I never saw or had the letter in my hand." The sense of this statement is materially changed by omissions in the quotation of it in Appellant's brief at page 96. Schumacher further said that Allen at no time told him he had written the matter now found in the letter put in evidence: "Mr. Allen never informed me of such expressions at all in a letter, and he never read such expressions to me, either." (P. 2127.) He says before the letter was written they discussed what relief would be

afforded to Sturm by his "surrendering all his affairs and clearing himself of all he owed—become a free man in some way or other * * * to take the benefit of the general bankruptcy law; that was the radical cure for that." (P. 2128.) He says that when he wrote Sturm, saying, "Allen gives you very sensible advice," etc., he understood Allen was writing him that "if he could not sustain himself any other way he should take the benefit of the bankruptcy law. That was our conversation;" that he did not intimate to Allen that Sturm should "sink" or make way with his property, and Allen did not inform him that he had written such advice. (P. 2128, qq. 23–29.)

ALLEN testified that he and defendants "talked over about Sturm going into bankruptcy" (p. 122, q. 19), and that he wrote Sturm for the purpose of advising him to do that (q. 20).

The parties agree that Allen was to advise bankruptcy in this letter. The letter Sturm produces (p. 122) contains no such advice. In it Allen wrote: "IF YOU HAVE NOT TURNED ALL OF YOUR REAL-ESTATE OUT OF YOUR HANDS BEFORE THIS YOU HAVE BEEN VERY FOOLISH, for you must expect to be annoyed by every one to whom you ever owed or promised a dollar, and THE QUICKER YOU FACE THE MUSIC AND HAVE NOTHING, THE QUICKER YOU WILL HAVE PEACE AND REST."

This letter advised Sturm not to go into bankruptcy, but to swindle his creditors in violation of the bankruptcy act in a way that would have prevented his going through bankruptcy.

If Allen did, as he claims (pp. 123, 124, 125), "pocket" the original draft of H. B. Co.'s "business" letter of June 22, 1876, so that years afterward he could produce it upon the witness-stand, it fixes his character as a man and as a witness.

Allen's advice to Sturm to "sink" his real estate was

as ill-timed as it was dishonest, for Sturm had, more than eighteen months before, voluntrily conveyed all of it to his family, as we have already shown.

As the letter did not contain what Allen and Schumacher swear it was agreed should go into it, we submit Schumacher is right when he says he had no knowledge that Allen wrote as he did, and that Allen is wrong when he testifies to the contrary.

Defendants sent Allen to Indianapolis to talk with Sturm, July 7, 1876, and to advise bankruptcy. (Funke, p. 2275, q. 982; Schumacher, 2130, q. 42; Allen, p. 127.) He was sent out, Schumacher says, to report Sturm's condition and how he could be relieved, "what was wanted and how we could relieve him. He was not authorized to do anything; he was principally authorized to look at the situation of General Sturm and inform himself, and then we would look into the matter and see what relief we could give and in what manner;" it was mentioned whether it would not be well for him to go into bankruptcy; defendants did not suggest to Allen that they would swell their claim or have anyone swell his claim against Sturm, if he should go through bankruptcy. Allen took the accounts along that Sturm might be fully acquainted "with his position toward us, how much he owed us and how far, as yet, he was justified to harass and press us for more money and particularly to pay old debts." (Schumacher, p. 2130, qq. 41–48.) Allen suggested that he had better not be seen in Indianapolis and that he would have Sturm meet him at Columbus, "which I understand is in the neighborhood of Indianapolis." (P. 2131.) He says they were taking an interest in Sturm, because: First, "there was the large amount that was owing to us; secondly, we had several large claims against the Mexican government. One of those claims he managed, for which he got 25 per cent. of what he might collect, and the other claim was a large amount of Mexican bonds, over $200,-

000, which we partly got from him for goods sold to Mexico and partly bought; also he was manager of that, so that they would be paid when the time came; at least we hoped that. Then he was interested himself in Mexican matters. He held several claims, one of which I believe, was over $500,000. All these things were inducing us of course, not to let him go physically and mentally to ruin." (Schumacher, p. 2131, q. 53.) Schumacher further states that Sturm always said he was intimate with prominent men at Washington: Senator Morton, who had great influence and that he, Sturm, could go to Washington "and get anything that could be got there," and that General Terrell, General Wallace, General Babcock, General Grant and Minister Thornton, the umpire in the Mexican Claims Commission, were also his friends. (P. 2131, qq. 57–62.) Such representations were also made by Sturm in the correspondence from which we have quoted.

Schumacher testified that Allen had no authority to arrange with Sturm for money from the defendants monthly "to keep him along, he had only to report; he had no authority whatever" to promise Sturm money, "he had only the expression of our kindly feelings for General Sturm." (P. 2131.)

Allen testified that he presented defendants' accounts to Sturm, and told him they were to be used in going through bankruptcy, and that Sturm replied that he did not owe defendants anything. (P. 127, q. 72.) The accounts Allen presented are set out in the record (pp. 128–131). Allen says Sturm said to him, that the bills were "false altogether," and "so far as going into bankruptcy is concerned, he would refuse to go there" (p. 131); that Sturm said he was in a bad fix himself, and did not know what to do. "I told him I thought I could arrange with H. B. & Co." for a stipulated amount, "to carry him on for the time being, and keep him along until this thing was accomplished, from three to five hundred dollars a

month; that Sturm said he would receive no money from defendants, but, "if I could let him have any money—as much as possible—he was in that situation that he would be very glad to receive it." Allen says he reported to defendants, and began to send $300 a month. "I sent that money to Sturm in hopes that he would go into bankruptcy, * * * * * to keep him along for a time until he did go into bankruptcy." (P. 135, qq. 81, 83.) Allen says defendants told him they wanted to so keep Sturm along until he could go through bankruptcy, and that "they kept feeding him along with this money, so much a month." (Q. 85.) In answer to question 86, p. 133, Allen says the defendants refused his request for $500 a month for Sturm, but said to him: "Allen, if you can make $300 do we will give that. MR. BOKER and Mr. Schumacher—they were together—they told me they would allow him to draw $300 a month, and furnish him with that for the time being."

This was not true. BOKER was in Europe from April, 1876, until September, 1876. (P. 2100, qq. 2829), and this conversation Allen speaks of, if it occurred, was in July, 1876. Allen says he took receipts to himself from Sturm for this money, and that "Bokers refused to give Sturm any money," direct; that he reported to H. B. & Co. all of his conversations with Sturm. (Pp. 132, 133, qq. 84-90.)

On cross-examination, Allen says he argued with Sturm for several hours to induce him to go into bankruptcy as Bokers had told him "to go in and do the best I could, and make all the promises necessary if I could carry the thing through."

ALLEN admits that defendants did not tell him to advise Sturm to allow any fictitious claim, or any just claim, for a fictitious amount, and says that he did not advise Sturm to do anything of that kind; "but he was to put in every debt that he owed, that is, he was not to skip

anything" (pp. 155, 166); that he did not advise Sturm to cheat or defraud his creditors, but to honestly give up his property and go through bankruptcy; "I never had any other idea than that." (Pp. 156, 157.) Asked what authority Bokers gave him, in the course of his answer, Allen said: "MR. SCHUMACHER HAD WRITTEN A LETTER, AND IN IT HE SAID I WOULD COME AND GIVE HIM THAT ADVICE," to go through bankruptcy. (P. 157, q. 364.)

No such letter from Mr. Schumacher, advising Sturm that Allen would go to Indianapolis, was produced, and Schumacher says he wrote no such letter. (P. 2136, q. 89.) Allen must have had in mind Schumacher's letter of June 22, 1876, saying: "Allen gives you very sensible advice." So Allen finally corroborates Schumacher in his statement that he thought Allen was writing Sturm advising bankruptcy, and not the "sinking" of his property. Allen says that he said to Sturm, "You can get some money out of Bokers;" and shows by his evidence that he gave Sturm to understand that any money that Allen "loaned" him would be defendants' money. He says, speaking of on what account he could get money from the defendants for Sturm: "I could get it on a good many accounts." (P. 159.)

SCHUMACHER testified that Allen, on his return, reported "that by the payment of $300 a month General Sturm would be kept alive so far as necessities were concerned;" and that General Sturm did not feel inclined to go into bankruptcy—"We made this allowance freely, without any condition and from good feelings toward General Sturm," and it had nothing to do with Sturm's going into bankruptcy; that Allen suggested the payment of the money to him for Sturm; that defendants did not refuse to pay it to Sturm direct; they knew he was getting it; that Allen did not report that Sturm had said he would take no money from Bokers. "Mr. Allen has never reported any such speech. Whatever Mr. Allen said to me was to the purpose of this refusal of entertaining the idea of going into

bankruptcy, and then of getting some money and how much —$300. That is all I know about it." Schumacher says that Allen did not report that Sturm denied that he owed defendants; that he did, however, report that he had promised Sturm that he would try to get from defendants the $300 a month, but said nothing about bankruptcy in that connection. (Pp. 2134, 2135.) Schumacher says as to Allen's statement that Bokers told him "to make all the promises necessary" to induce Sturm to go through bankruptcy, "I may say that it is an entire untruth. I know of no member of the firm giving any such authority." He says that the defendants did not tell Allen that they would keep Sturm in New York and set him up in business after he had been through bankruptcy, and that the defendants did not hold out "such proposals" to General Sturm, and Allen reported no such promises as made by him to Sturm (p. 2135); that the reason they consented to give Sturm the $300 was "simply to keep him alive and well so that he could attend to our interests, as I have said before, those Mexican matters—our claim and his claim. He was at the time sick, even physically and mentally, in my opinion; in our opinion he was almost weak-minded; he was sick in mind." Asked why he so asserted, he replied, "Because he said so, and on account of his troubles and harassing he had from his creditors, and nothing cheering turned up;" that the $300 was to be paid temporarily—no time fixed—and that it ceased when Sturm made an assignment to John C. New, and when Sturm's creditors were claiming the money as assets of Sturm. (P. 2136.)

ALLEN AND STURM LETTERS.

Sturm produced (pp. 235, 263) a number of letters which he said passed between him and Allen. On direct examination Allen testified that he showed to defendants, before mailing, all of his letters to Sturm. (P. 126, q. 59, p. 137, q. 128, *et seq.*) Allen says that defendants would tell him to write Sturm a letter "as though they had nothing to do

with it." (P. 142, q. 159.) On cross-examination he materially weakened his statement by such expressions as: "I think I showed them;" "Well, I did, I will say that positively;" "I think I showed the bulk of them, in fact they have seen them all *since this trial commenced. I took and handed them all to them to read;*" "O I don't know, I suppose I showed it to Mr. Funke or Mr. Schumacher;" "I don't know whether I did or not, but I suppose I did * * * I told them the contents of it;" "I presume I showed it to Mr. Schumacher or Mr. Funke, or both of them, more than likely." (Pp. 141–146, qq. 160, 164, 167, 168, 176, 184, 185, 187, 188, 190, 192, 204, 205, 207, 208.) There is more to the same effect in Allen's testimony. (Pp. 146–152.)

The letters of Allen to Sturm abound in expressions of confidence between Allen and Sturm; in personal messages of regard to members of the respective families; they frequently say and oftener imply that Allen writes without the knowledge of H. B. & Co., and only for Sturm's eye. Allen testifies that when he so wrote he was carrying out a conspiracy between him and H. B. & Co., by which he was to write as Sturm's confidential friend, as though the defendants did not know that he was writing or what he wrote. Allen, therefore, according to his own story, falsified either in his own letters or on the witness stand. We submit he is seriously discredited as a witness.

Allen, on page 150, in cross-examination, testified that he was on the best of terms with defendants; that he had had no trouble whatever with them, and that he had no feelings of hostility toward them.

Mr. Funke testified that Allen is hostile to the defendants. (P. 2279.) That he is so is abundantly proven by Allen's letters set out by Sturm. We quote from one of them, dated February 22, 1878, and written on a letter head of the W., T., P. & W. R'y Co. (p. 249):

"DEAR GENERAL—Yours received and contents noted and all I can say in regard to Parsons' suit is that is set down for next Monday. I saw Funke on the street yes-

terday and I told him what I thought of the treatment they had shown me in regard to the papers I trusted to Schumacher, and he pretended not to know anything about it and said he would go back to the store and inquire into it, but I am too old to be taken in "in that way." I THINK HE HAS JUST FOUND OUT THAT THE PAPERS ARE NO GOOD TO HIM IN THE PARSONS SUIT, AND THAT HE CAN NOT WIN IT UNLESS MY EVIDENCE WINS IT, BUT IT IS TOO LATE NOW. I have just taken a position with this road as contracting agent under E. J. Burritt, and you can send any letters to me hereafter, addressed to me care of the above railway, 271 Broadway, N. Y. I WISH YOU WOULD POST ME WHAT ANSWERS THEY PUT IN THE SUIT IN YOUR CITY, AS I DO NOT INTEND TO ALLOW THEM TO PUT THE EXPENSES AND COST ANY LARGER THAN THEY REALLY ARE, AS I AM POSTED WHAT THEY ARE AND ALL ABOUT THE DEFENSE, and have seen all the papers long ago, and know they did intend to swell the amounts, BUT AS SOON AS I GOT OUT WITH THEM THEY KEPT EVERYTHING FROM ME."

Nothing could be said by way of comment that would rate Mr. Allen as a witness any lower in the scale than he rates himself in this letter.

Allen's acquaintance with Sturm seems to have begun with a transaction wherein Sturm chartered of Allen, early in 1867, the steamer "General McCallum" to carry some arms to Mexico. Allen sued Sturm for breach of the contract, and recovered, December 19, 1871, in the Federal Court, in Brooklyn, N. Y., judgment for $11,888.67, known in the record as the "Allen and Latson judgment." (Sturm, p. 722.) This judgment Sturm, in 1875, through the agency of Naltner, "bought" from Allen and Latson's heirs; the judgment was assigned to Naltner, who gave Sturm a power of attorney "so that I could use the judgment. The judgment was mine and I could use it whichever way I wanted to." (Sturm, pp. 722–723.) Sturm later on tried to work in this judgment as a live obligation, and to claim that his wife had an equitable title to it, but failed. (Pp. 724–732.) Allen, it seems, was assisting Sturm in keeping up this fiction. (Sturm's letter to Allen, November 12, 1876, p. 254.)

Considerable attention is given by appellant's counsel to some receipted bills of Sturm, for insurance expenses, which they say Allen delivered to defendants, and which defendants, they claim, have suppressed. They make this argument in an attempt to charge defendants with the FORM of the receipts. They produce what Sturm says are impression copies of them. They say they were taken in the course of the insurance litigation, and that they show that Sturm was taking vouchers for services of his witnesses, etc., in the "joint suits" of himself and defendants. One or two of the copies contain the expression "joint suits," but a great many more do not. They are set out at pages 1322–1326. They are not original vouchers, but statements in final settlement itemizing numerous payments made at divers times. W. F. Stocking's "receipt," used as a sample by appellant in argument, is dated in 1875 and covers payments from 1867 to that date, aggregating over $13,000. The Bokers paid, for Sturm, the larger part of the insurance expenses, and rendered original receipts to Sturm as checks or vouchers from time to time, with his bank book. No original receipts, or receipts of any kind, taken by Boker & Co., "as the suits progressed," are produced by Sturm, and their absence is significant.

Whether the defendants have ever had Sturm's receipts becomes a question of veracity. Sturm says he gave them to Allen, in September, 1876, except Mr. Parsons' bill, which he sent him several months later by mail. Allen says he delivered whatever Sturm gave him to Mr. Schumacher, but he does not seem to distinguish the delivery of Parsons' receipt and the other papers; that he did not look over the papers that Sturm gave him in September, and that they were in an envelope. (Pp. 133, 134.)

Mr. Schumacher says that upon one occasion and only one, Allen handed him some papers as coming from Sturm; that whatever they were, they were in an envelope and that he, Schumacher, handed the package just as it was to Mr. Boker, and he kept it. (P. 2137, q. 103.)

Mr. Boker says (p. 2117), that Mr. Schumacher handed him an envelope with Parsons' bill in it, and nothing else; that he saw no stenographic report and no other receipts or bills; that he kept the Parsons bill for use in the Parsons case, and still has it. (Pp. 2117, 2118).

LIFE POLICIES.

Under this title complainant's counsel attempt to convey to the court a nebulous theory of Sturm's, that when he insured his life for $30,000 and made the policies payable to the defendants he did not intend to secure the defendants as his creditors, but intended to secure some unknown creditors that he might possibly have some time in the future.

It is unnecessary to argue here that these policies were taken out as collateral security for defendants against Sturm's indebtedness to them, for several of Sturm's letters, from which we have quoted, distinctly state that they were, and the defendants testify that they received them and now hold them as collateral security. (Schumacher, p. 2156, qq. 189–203; Funke, p. 2237, qq. 576–582; p. 2241, qq. 617–622; Sturm's letter of October 26, 1873, p. 619; Sturm's letter of October 5, 1875, p. 675; Schumacher's letter of October 28, 1875, p. 676; Sturm's letter of July 4, 1876, p. 379.)

EXHIBITS "F" AND "H."

In view of the evidence in the record, as to whether Sturm's Exhibits "F" and "H," of 1883, are forged or genuine, we are not surprised to read the opening sentence of appellant's counsel in their consideration of them; "THESE ARE NOT NECESSARY TO THE DECISION OF THIS CASE." (P. 106.)

They say that the Circuit Judge decided that these papers were forgeries, and held "that, by reason of the forgery, the axiom about 'coming into a court of equity with clean hands' was applicable this case. This was error, both in law and fact." They say as to the alleged error of

law, in substance, that they will not discuss it, but will refer only to the remarks of the District Judge. We shall quote the remarks of each of the trial judges referred to by appellant's counsel:

GRESHAM, Circuit Judge. (P. 102.)—"I might review the case further, but it is sufficient to say that General Sturm is in a court of equity, a court of conscience, asking relief, and that on previous occasions he swore differently from what he swears here. His statement, in connection with the deed just alluded to, he knew was not correct, and I am forced to believe that he fabricated exhibits F and H. He is contradicted by H. B. & Co. and others. He is obliged to maintain his case by a preponderance of the evidence, which he has not done. Much of his case depends upon his own evidence. I do not think a Court, believing that he has been thus discredited, could be expected to enter a decree in his favor mainly on his own evidence. I think the bill ought to be dismissed." (P. 102.)

WOODS, District Judge. (P. 114.)—"Now, one word as to clean hands. I do not think that doctrine applies strictly to the production of false evidence in a case, if the rights of a party are clearly established otherwise. A man must have clean hands in respect to his original cause of action. The cause of action must not have originated in corruption; but, if once you say that equity will not administer between parties who try to produce a false impression in the evidence, you lift equity above the plane of practical usefulness in the affairs of men. If I concede that General Sturm forged these papers (F and H), I would simply say it was the case of a man making Greek fire with which to fight his more desperate and despicable foe. It does not affect his rights on the original cause of action, because that stands clear and well-established, independently of all disputed, or at least of all fairly questionable, memoranda, documents or conduct."

JUDGE GRESHAM (p. 115), added—"Sturm comes now to a court of equity saying, in effect, H. B. & Co. owes me a sum of money, and I claim it upon these letters evidencing the contract. True, I gave this contract a different interpretation in the suits which resulted between myself and H. B. & Co. and the insurance companies. True, if

what I swore to there was true I am not entitled to recover here, but what I swore to there was not true. I was tempted by my interest. The District Judge says he was obliged to swear that way; the stake was so great that his virtue was not strong enough to withstand the temptation, and he swore to what was not true. He did that before this suit was commenced, and with relation to the very contract on which he sues here. So it was not fraud or false swearing after this suit was commenced altogether; it was false swearing after this suit was commenced as well as before." * * * * "Then in a word I find that Sturm has made statements, under oath, as well as otherwise, before this suit was brought, inconsistent with his position here, and which, if true, will not allow him to recover. In addition to that I find that during the progress of this trial he made statements under oath which were untrue, and that he knew were untrue. Further, I find that the exhibits were fabricated, and the District Judge and myself do not disagree up to a certain point in that connection—that is to say, he agrees that if the simple issue were submitted to us on the evidence in the record—were 'F' and 'H' fabricated or were they genuine—then he would think they were fabricated, but taken in connection with the other evidence he can not say so."

JUDGE WOODS—"That is—on the direct evidence. The evidence bearing directly on that issue."

JUDGE GRESHAM—"I think the District Judge does not give perhaps sufficient weight to the fact that this is a court of equity, and that the complainant must have a preponderance of the evidence."

JUDGE WOODS—"On that point I understand that the case began in the State court as a case at law and was transferred to this court on motion of defendants and was transferred to the equity side of the court, so the complainant can not be said to have chosen an equity court to come into." (Pp. 116, 117.)

The District Judge spoke inaccurately when he said or intimated that Sturm so long as he was in the Indiana State court was in a court of law prosecuting "a case at law." Under the code of practice of that State its courts are no less courts of chancery than common law courts. They are simply courts. In them the plaintiff

files his complaint and it becomes "a civil action." If the facts pleaded entitle him to equitable relief, the court sitting as a chancellor grants that sort of relief; if they entitle him to relief at law, his case is tried as at law, and his legal rights are secured.

Sturm had been examined as a witness in this case three times before November, 1883, when he produced exhibits "F" and "H." He did not intimate until he produced these papers in evidence, that they, or like papers, ever existed. Sturm time and again in his testimony before November, 1883, spoke of the letters of consignment and their accompanying invoice as the only written evidence of the contract between the parties. For example:

In 1881 (p. 176, q. 50). "There is no other agreement between H. B. & Co. and myself in relation to this bill, of which I have just spoken, than what is contained in those two letters; unless the letter of the date of October 24, 1867, may incidentally refer to this bill;" and thereupon he read the letter of October 24.

Again in 1881 (p. 193, q. 152.) "These letters of consignment form all the contract that ever existed between H. B. & Co. and myself at that time, in regard to those goods, and I have so testified, and Mr. Funke has testified so in every case that has been tried."

In 1882 (p. 432, x.-q. 343; p. 438, x.-q. 386), referring to his answer to question 152 above, Sturm said: "That is correct. That is all the contract we ever had, that IS IN WRITING."

In 1882 (p. 298) Sturm testified that in March, 1868, Mr. Parsons, his attorney, wished to see the contract, and that he submitted to Parsons these letters and invoices.

In 1870, Sturm *v.* Williams (U. S. Lloyds), speaking of these letters, Sturm said there was "NO OTHER AGREEMENT" (p. 454, x.-q. 479), and in 1876, in Funke *v.* N. Y. Mutual, etc., Co., he testified to the same effect. (Pp. 501, 502, x.-q. 735½.)

Mr. Funke, when examined in 1881, by complainant, testified substantially that the contract of consignment was at

first verbal, but was afterward reduced to writing, in a letter dated September 18, 1867, and its enclosed bill. (P. 973, qq. 87-122.)

All of Sturm's oral testimony in this case, all of his numerous "memoranda," his testimony in the various insurance cases quoted in this brief, and his correspondence with Mr. Parsons, show that there was but one written agreement between defendants and Sturm respecting the consigned goods, and that that was evidenced by these letters of consignment and invoice.

Sturm, in his re-examination, November, 1883, first mentioned the existence of exhibits "F" and "H." His account of their "discovery" begins on page 1307, with question 34. Briefly stated, his evidence of their discovery in direct examination was as follows: That his brother, Frederick C. Sturm, and later, his brother, Robert C. Sturm, had had possession of some of his papers, memoranda, etc. "When I left for Mexico, on the steamer Wilmington, on the 25th day of October, 1867, my brother, Frederick C. Sturm, had charge of my papers until my return. He is now living here in this city (Indianapolis), and gave his testimony some time ago in this case. In November, 1868, when I returned to Mexico the second time, my papers were put in charge of my brother, Robert C. Sturm, who is now dead, and he took those papers with him to Indianapolis." (P. 1307, qq. 34–36.) Sturm says that "*since the conclusion*" of his cross-examination (December 12, 1882, p. 957), he has been looking through Robert C. Sturm's papers for papers connected with this matter. "I did (look through them), in company with my other brother, on the 14th day of January and in February, as I told Mr. Hord in cross-examination that I would do." (P. 1308, q. 37.) He then produces an envelope endorsed "F. C. Sturm, January 14, 1883," and also endorsed on the other side thereof "Assignments to General Sturm, Bridgeford, Wayland," and

says that the handwriting of the words "F. C. Sturm, January 14, 1883," is that of his brother Frederick, and that that is *the date* on which the envelope was found. (P. 1308.) Asked whether when he found the envelope he found other papers in it, he replies, "I found this envelope and several others, but this one was found on the day stated—January 14—and I offer it for identification. * * * * * * It contained papers. * * * * * * These papers were found in this envelope (producing four papers) and I offer them for identification." The envelope was marked exhibit "D," and the papers respectively "E," "F," "G" and "H." (P. 1308, qq. 37–42.

Asked whether or not there were any other papers in the envelope he replied: "Yes, sir; but all in a dilapidated condition—partly at least—and not referring to this business, and so I have not brought them." Asked in what condition the four papers exhibited were when found, he says: "As you see here by the envelope and by the assignment of James Wayland to H. Sturm contained therein; it was partly rotten and torn; there were two holes eaten through it, it seems." He says there were other papers that bore evidence of decay. "All that were in that envelope, with the exception of that one piece, which does not show much decay (indicating), neither does the underside of this one (indicating) show a great deal." (Pp. 1308-1309, q. 43, 45).

His counsel hands him exhibit "F," and questions him as to the hand-writing thereof and Sturm replies: "The body of the writing is my own hand, and the signature (Hermann Boker & Co.) is that of Hermann Funke." He then sets out a copy of exhibit "F," and describes what portions of the writing are underscored, and says that he underscored it "at the time it was written." Sturm says that this paper is in just the condition it was when he found it, "except as two pieces of paper that I pasted on the back because the paper was partly torn." P. 1309 qq. 46–51.

Sturm, on page 1310, sets out a copy of exhibit "H" and says, "After the words 'for our account,' there is something torn out there; I don't know what that was; then the signature of Hermann Boker & Co. is partly torn." As to the handwriting of the body of "H," "I believe it is my own handwriting; I am confident of it. The signature is in the handwriting of Hermann Funke."

He says that the circular stamp, "bearing date October 11, 1867," is the stamp of defendant firm, and that he has seen such stamps in their office. "THERE IS THE WORD MEMORANDUM" printed on it. There is also written on it for identification, "F. C. S., Jan. 14th, '83;" that his brother, so marked the paper when it was found. Asked whether this paper "H" is in the the same condition as when found he says: "No sir, it is not. It was torn as you observe; there were two holes in it. Where the stamp is it was partly torn, and I pasted it on that paper—on the back of it—so as to preserve it. I pasted it on the yellow paper on the back of it to preserve it." (Pp. 1309-1311, qq. 52–61). Sturm then briefly describes exhibits "E" and "G" and then produces another paper which he says he found in the same envelope and which he says has the word "MEMORANDUM" printed upon it and which he has identified as exhibit "K." He says of "K:" "On the side where the 'MEMORANDUM' is printed it is in my handwriting. The other side is in the handwriting of Mr. Funke—that portion written in ink. In blue pencil the words 'charge H. B. & Co.' and the identification is in the handwriting of my brother, and I recollect the making of that paper very well, indeed, now." Exhibit "K" was not set out. (Pp. 1311, 1312, qq. 62–68.)

Sturm says that *since his cross-examination* CLOSED he has made search for other letters and has found a number of his papers, letters which he wrote to his brother, and a letter of instruction sent him in September, 1867, also a letter-press book mislaid since 1876, when Sturm returned from Washington. (P. 1312, q. 70.

In cross-examination (p. 1347) Sturm says that he found the envelope, exhibit "D", on Sunday, January 14, 1883, among the papers of his deceased brother Robert; that Robert died in May, 1882; that he was a bachelor, and had lived since 1856 with Sturm's family; that the "Keese" was lost in October, 1867, and at that time Sturm's family were living on Staten Island; that the family returned to Indianapolis just before Sturm returned to Mexico late in October, 1868; that from that time until Robert's death Sturm "kept house" at Indianapolis, and Robert resided with him and had charge of Sturm's family and business when Sturm was absent; that Robert was during that time conducting a brass foundry and subsequently a lumber business, with Sturm, until 1876, after which Robert was sick and "more or less out of his mind," and thereafter had no business (pp. 1347–1349, x.-qq. 296, 295, 335); that he found the envelope, "D", in a "tin box" among his brother's papers up stairs in his brother's room where his brother's papers, passports, books, notes, checks, etc., were carefully stored (p. 1347), that they had been put there after his brother's death; that there was an understanding between him and his brother Fred that after the lapse of one year after Robert's death, IF HIS WILL HAD NOT BEEN FOUND, FRED AND STURM WOULD GO THROUGH ROBERT'S PAPERS; that he, Sturm, would not touch Robert's papers, as at one time Robert had possessed property, and there were other heirs, sisters, unless the other members of the family were present, and "WE AGREED AMONG OURSELVES, AFTER MY CROSS-EXAMINATION, WHEN YOU ASKED ME ABOUT THESE THINGS, THAT WE WOULD GO AT IT SOON. I asked my brother-in-law to be present, but he could not. My brother then agreed with me that he would come Sundays, the only time he could get off, AND WE WOULD COMMENCE ON THE FIRST SUNDAY IN JANUARY, RIGHT AFTER NEW YEAR'S, and the first Sunday after New Year's WE COMMENCED AND KEPT THAT UP." Sturm says that he found a "whole lot"

of papers that his deceased brother had had stowed away in different places, some in the old house up under the roof, that the "tin box" in which the envelope was found had his, Herman Sturm's, name upon it, that he had used it during the war at the arsenal at Indianapolis; that his brother put two locks upon it, which he got from Europe and kept it, and "had his own way about it." Asked whether the other papers found were in this tin box or just thrown around in bundles as unimportant, he said, "They were thrown around, they were tied — some were tied together in bundles, some were in the safe tied together, and that is about all I can give you;" that they were so tied and arranged when he found them, January 14, 1883; that the safe was an iron safe which his brother Robert had "almost for his own exclusive use," for his own and Herman Sturm's papers; that all these papers went by the name of "Robert's papers" and that after Robert's death they were moved around from one room to another several times until taken to a vacant room up stairs where the search of January 14 took place. Sturm says that he does not know where Robert kept his papers before his death, and that upon Robert's death Fred took charge of them. "I told him, 'here, I do not want to do anything with these papers, *I do not want to touch them.*'" (Pp. 1349, 1351, x.-qq. 336–357.)

Sturm says, before his brother's death, he saw a pile of books and papers, and knew that in the safe, of which Robert had the key, there were papers, and knew that tin box was there; that the safe and papers were in Robert's bed-room when he died. (P. 1352.) He finally says that about a week before the search, which commenced on January 14, was made, he moved the papers into his, Sturm's, room. (P. 1354.) Sturm shows that his brother was not supposed to have any property at the time he died, except 320 acres of unimproved land in Illinois, of which no one had thought enough to pay the taxes since his brother

died. (P. 1354.) He was, therefore, searching for the WILL of a person who died INSANE AND WITHOUT PROPERTY.

Sturm says (p. 1355) that he filed the lock off of the tin box, as it was a combination lock without keys; that the box contained, besides this envelope, a "whole pile" of papers; that his brother had had the box ever since Sturm was at the arsenal, during the war. (P. 1355.)

Of the envelope, Sturm says that is was a MANILLA DOCUMENT ENVELOPE; "THAT I KNOW I SAW IT IN 1876; I want to put that in;" that he then saw it in his house about the time Mr. New wanted to take hold of Sturm's business with H. B. & Co.; that he does not remember among whose papers it then was, but thinks his brother Robert must have shown it to him, because in it was an assignment of a patent, Exhibit "G," that Sturm then presented to Robert, and that Colonel Horace Scott was present when the presentation was made; "I know that, and that is the last time I know anything about it." The paper referred to as Exhibit "G" was an assignment of a patent by James Wayland, DATED JULY 28, 1875. He says that at the time he gave Robert the patent, it was in this envelope "D," but that he does not know where he, Sturm, kept the envelope or assignment up to that time.

Sturm says that when he saw this envelope, IN 1876, THERE WERE NO HOLES IN IT SO FAR AS HE KNOWS (p. 1357, q. 445); that the envelope is now in substantially the same condition as when found in 1883; that now it has holes in it on the "flap" side, but none on the other side—TWO PRETTY LARGE HOLES; that there are holes in the Wayland assignment, and the paper is decaying and dropping to peices, and that when this paper is folded, the decaying part runs through several folds of the paper; that it is brown and rotten. (Pp. 1355–1358, x.-qq. 417–464.)

Sturm testified that Exhibit "F" was written by him, Sturm, in the cabin of the steamer "Wilmington," on October 25, 1867, in the presence of Funke and Stocking;

that it was written upon Sturm's portable writing-desk; that he remembers that he and Funke and other friends had been drinking "a whole basket of champagne"; that he wrote this paper about an hour before the steamer sailed, and that Funke was there until she sailed; that it was written on an "invoice that I had, a slip of paper," although he says he had writing-paper there. He says he evidently "took an invoice that I had for part of the goods, while we were talking about those articles, and I wrote this on the back of it." He says that on the reverse side of Exhibit "F" is printed "United States Army goods, Watervliet, West Troy, New York." (Pp. 1359–1361.)

In cross-question 508 (p. 1361), Sturm was asked if he remembered writing exhibit "F," and Mr. Funke's signing it on the "Wilmington," and answered, "No, sir, only since I have seen it. I have all throughout this examination, from the preliminary examination on until I found the paper, had an impression on my mind that such a paper was in existence, and that I did get some sort of a receipt, but the matter had escaped my attention and my recollection, and I have hunted and hunted for such a receipt and other papers." Asked whether he had ever mentioned in his testimony in this case that he thought such a document ever existed, he replied: "I can not recall it, but Judge Claypool will recollect it; he knows. I called his attention to it several times that there must be something, and I stated to you, in answer to one of your questions, that such and such things occurred, and I was sure that I made a memorandum of it or that I took—I don't know that I said I took a receipt for it."

Neither the complainant nor his counsel have ever been able to point out the place in the record where Sturm had, as he claims, intimated that he believed this paper or any similar paper had ever existed. He makes the same assertion later in his cross-examination (p. 1364, qq. 534–537).

In answer to cross-questions 514–16, he, in different language, gives his "recollection" of the writing and signing of exhibit "F." (P. 1362, x-qq. 509–516.)

Sturm says he does not recollect anything at all about what he did with the paper after it was signed. "The paper has escaped my memory all the time, so has the other paper." He says that he doesn't think he has seen exhibit "F" since it was signed October 25, 1867, until he found it January 14, 1883. "I can not recall any incident that refreshes my recollection about it."

He says that on October 25, 1867, his brother Robert was in Mexico, and that he, Sturm, met Robert at Vera Cruz, November 5, 1867, and that Robert returned to the United States in March or April, 1868, and that from that time until September, 1868, Robert was in New York with Sturm's family. (P. 1363.)

Sturm says that exhibit "H," when he found it, was pasted on a piece of paper, and that he added still another backing of yellow after it was found, because it was in such a condition that without the yellow backing it would not hold together; that it was folded together and torn, having two holes in it, one near the letter H and the other near the letter B, and another, all being in the signature. He thinks that "F" and "H" are written on paper not ruled. He says that both these exhibits show rough usage.

He says in answer to cross-question 565, wherein he was asked were exhibit "H" was written, "I do not know a thing about it. The more I think of it the more mixed up I get. I have simply a recollection of calling upon Mr. Funke, and as my memorandum states. I have only a recollection that I did take some kind of a receipt for the policies before I left for Mexico, but I do not recollect the fact of writing it; I do not recollect the fact of Mr. Funke signing it, or under what circumstances it was done; I can not recall to mind the particulars." Asked whether prior to the discovery of "H" in the tin box he had any

recollection of the existence of such a document he answered: "No sir, I have simply, as I have stated, had that impression on my mind ever since we commenced this suit, that there was such a paper; that there was some such paper." Sturm reiterates that he had told his own counsel and that somewhere in his testimony in this case he had testified that he had some kind of a paper like "H." He promises defendants counsel that he will point out the place in the record where he so testifies; but he never did. (Pp. 1367, 1368,x.-qq. 566-574.) Defendants' counsel several times in the examination tried to get Sturm to produce or describe the papers found in the decayed manilla envelope other than the exhibits he introduced, but he avoided the question and finally said that he was not sure whether the papers not introduced were found in the envelope or not, but that he would ask his brother Frederick about that! Under this part of the examination Sturm produced a letter of Captain Keeney, dated Vera Cruz, October 18, 1867, which he first said was in the envelope and then said it might have been on the outside, he rather thought it was on the outside. Strange to say this letter, which was on blue paper also had TWO SPOTS on it of a yellow color running entirely through both sheets of the letter when half folded and the letter just at those points was rotting away. (P. 1368.)

On page 1369 Sturm promises to produce, the next day, all of the papers he has which were in the envelope; but he never did. On page 1370 Sturm shows that all his recitals about searching his brother's papers in January under an agreement with his family are not true. A paper which he had introduced as exhibit "V" on November 7, 1883, a list of Mexican bonds was called to his attention, and he said that was found in the tin box, but he did not know whether it was in the envelope or not; he then said: "Looking at the papers now, I say that was not among my brother's papers; that was a paper that I got hold of before." Asked where he got it, he answered: "I do

not recollect now. It was in an envelope with another paper, in the handwriting of Mr. Schumacher, which I will show you (producing the paper referred to). These two papers were together. I had that before but I did not use it." He says he had them both "before." Asked how long, he said, "I do not know how long I have had them; ever since I received them, as a matter of course; but I can not tell you when that was. I am a little mixed about those two papers. I know that I had them. I have had them since April 25, 1868; but they have been out of my mind for a long time, and I can not now tell you just where I got them. I believe I had these two papers in my possession during the last cross-examination a year ago. THEY WERE ALL FOUND AMONG MY BROTHER'S PAPERS. THAT IS WHAT I WANT TO HAVE UNDERSTOOD." Sturm is reminded by defendants' counsel that his cross-examination commenced November 14, 1882, and he is asked if he had these papers then. He answers, "Yes, sir; I am confident I had them there at that time, but they were mislaid; and I think that, in answer to one of your questions, I said I had a list of bonds somewhere, but I could not tell where." He then says that he found the two papers again during the cross-examination, and "before I found the papers among my brother's papers, I found them among my own papers. IT MAY HAVE BEEN IN THAT VERY TIN BOX; I CAN NOT TELL YOU." (Pp. 1370, 1371.)

We submit that this sort of equivocation shows that Sturm had made up the story of the search for his brother's will, the tin box, the rotting papers, the checks, etc., and it was because he could not trust his brother Fred, if he had the willingness, to tell the same story, that he did not put him on the stand to corroborate him. The farther he goes the worse confused he gets in his attempts to extricate himself from this contradiction. (P. 1372, *et seq.*)

On direct examination he testified that by a prior agreement with his relatives this search was begun on January

14, 1883; and that from sentimental motives he had not up to that time touched his brother's papers; that on that Sunday, January 14, he filed the lock off the tin box. Here he testifies that these two papers were certainly found among his brother's paper, and possibly found in the tin box, had been found and were in his possession when he was cross-examined in November, 1882. The evidence of the finding of these papers came from Sturm alone. He took the witness stand again in 1885 and tried to smooth over the contradictions mentioned, by flatly stating that he and Fred Sturm examined his brother's papers during his cross-examination in 1882. (P. 1674, q. 229).

We have now shown the manner in which exhibits "F" and "H" were put into the record and we submit that they were discredited before the defendants testified in regard to them.

Exhibits "F" and "H" are set out in the record at pages 1309 and 1310 and are respectively as follows:

"F."

MEMORANDUM—"We have insured our goods on the 'Keese' and 'Blonde' for a *maximum* of $40,000 which includes the premium which we have to pay. In case of accident we select our policies, and we stand all loss and General Sturm pays shipping expenses only. *We hold in trust for General Sturm* $30,000 *policies* on the 'Keese' and also a package of Mexican bonds left over from the $105,000 delivered to us September 20. *We also now direct General Sturm to dispose of the batteries at any price:* Steamer Wilmington, October 25, '67.

"HERMANN BOKER & CO."

"F. C. S., January 14, '83.

not recollect now. It was in an envelope with another paper, in the handwriting of Mr. Schumacher, which I will show you (producing the paper referred to). These two papers were together. I had that before but I did not use it." He says he had them both "before." Asked how long, he said, "I do not know how long I have had them; ever since I received them, as a matter of course; but I can not tell you when that was. I am a little mixed about those two papers. I know that I had them. I have had them since April 25, 1868; but they have been out of my mind for a long time, and I can not now tell you just where I got them. I believe I had these two papers in my possession during the last cross-examination a year ago. THEY WERE ALL FOUND AMONG MY BROTHER'S PAPERS. THAT IS WHAT I WANT TO HAVE UNDERSTOOD." Sturm is reminded by defendants' counsel that his cross-examination commenced November 14, 1882, and he is asked if he had these papers then. He answers, "Yes, sir; I am confident I had them there at that time, but they were mislaid; and I think that, in answer to one of your questions, I said I had a list of bonds somewhere, but I could not tell where." He then says that he found the two papers again during the cross-examination, and "before I found the papers among my brother's papers, I found them among my own papers. IT MAY HAVE BEEN IN THAT VERY TIN BOX; I CAN NOT TELL YOU." (Pp. 1370, 1371.)

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MEMORANDUM—"We have insured our goods on the 'Keese' and 'Blonde' for a *maximum* of $40,000 which includes the premium which we have to pay. In case of accident we select our policies, and we stand all loss and General Sturm pays shipping expenses only. *We hold in trust for General Sturm* $30,000 *policies* on the 'Keese' and also a package of Mexican bonds left over from the $105,000 delivered to us September 20. *We also now direct General Sturm to dispose of the batteries at any price:* Steamer Wilmington, October 25, '67.

"HERMANN BOKER & Co."

" F. C. S., January 14, '83.

"H."

"Memorandum, New York, October 11th, 1867.

"We have received from Johnson & Higgins, $163,000 Policies on the Schooner 'Keese' and $30,000 on the Brig 'Blonde,' as per statement attached. We directed them to insure our goods for $40,000, which covers our bill of Sept. 18th, and premium, but no profit. To enable us to select our policies, Gen'l Sturm has endorsed in blank, five policies, amounting to $70,000, as follows:

"On 'Keese,' the Orient Mutual $15,000, and New York Mutual $12,500, Sun Mutual $12,500, and Mercantile Mutual $15,000.

"On 'Blonde,' the U. S. Lloyd's policy for $15,000, which we have taken as ours.

"Leaving balance for us to select on 'Keese' of $25,000, of which we have so far selected only the Orient, and as we can not divide the policies to suit us, we hereby agree this day to keep all the four policies on the 'Keese' for the joint account of ourselves and Gen'l H. Sturm, and in case of any accident or loss we will collect the amount of the policies from the companies, and pay over to Gen'l Sturm his share, viz., 30-55 of the whole amount collected; and we also agree to pay the premium notes, for our share of the policies, and to stand all loss, if any should happen, to our goods.

"Gen'l Sturm is to bear the shipping expenses only, and in no event shall he be held responsible for any accident or damage, or any act of the Mexican Government; but in case he can not sell the arms at the price agreed upon, and has to return them, he shall insure them for our account.

"The foregoing is hereby fully approved and agreed to.

"HERMANN BOKER & Co.

(Stamp.)

MEMORANDUM.

"F. C. S.

"Jan. 14, '83."

Ex. "H" OF 1883

Memorandum: New York October 11th 1862.

We have received from Delmonico & Higgins $[illegible] Policies on the Schooner Reuse and $130,000 on the Brigt Sloat as per Schedule attached. We directed them to insure our goods for $40,000 which they have done [illegible] premiums but no policies. To enable us to select our Policies Genl Sherman has endorsed in blank five Policies amounting to $70,000 as follows.

On Reuse The Orient Mutual $15,000 - New York Mutual $14,500

Sun Mutual $12,500 - Mercantile Mutual $15,000

On Sloat The U.S. Steamer Policy for $15,000 which we have taken as ours.

Leaving a balance for us to select on Reuse of $25,000 on which we have so far selected only by the Orient and are entitled to make the selection so that we hereby agree that by so doing all the Sun policies on the Reuse are for the joint account of ourselves and Genl Sherman and in case of any accident or loss we will collect the amount of the policies from the Companies and pay over to Genl Sherman his share viz 30/55 of the whole amount collected. And we also agree to pay the Remaining notes for our share of the Policies and to save and hold Genl Sherman harmless from all loss of any kind that may accrue to our joint interest in the shipping specified only and in no event shall he be held responsible for any accident or damage or any act of the Mexican Govt but in case he cannot sell the Vessels at the prices agreed upon and has to return them he shall insure them for our Acct

MEMORANDUM

The foregoing is hereby fully approved and agreed to.

[signature]

Ex. "F" of 1883.

Memorandum: We have insured our goods on the "Reed" and "Blonde" for a maximum of $72,000 which includes the Premium which we have to pay. In case of accident we collect our policies and we stand all loss & G. Sturm pays shipping charges only. We hold in trust for Col Sturm $30,000 Policies on the Reed and also a Portion of American bonds left over from the $105,000 delivered to us Septr 20th. In case Col Sturm direct G. Sturm to dispose of the Batteries at any price.

Steamer Wilmington Octr 25th 67

Norman Wright

"5 ORDERS"

MEMORANDUM
MEMORANDUM
MEMORANDUM
MEMORANDUM
MEMORANDUM

Ex. "C" OF 1881 AND OF 1883 "E-F"

No 29

New York 5th June 1867

Received from Lieut Herman Stumm
Eight Six Thousand ($8,000.00) Dollars
in Mexican Bonds.

Herman Stumm

Sturm, in his direct examination of 1882, produced what he claimed was a memorandum, "made at the time," of what took place between him and Funke on board the steamer Wilmington, on October 25, 1867. This diary entry does not mention the writing or signing of exhibit "F."

Mr. Funke testified that defendants never agreed or contracted with Sturm according to the provisions of exhibits "F" or "H"; that he never signed either of these documents. (Pp. 2265–2268). Mr. Schumacher says that he never heard of either "F" or "H" until they were introduced in evidence by Sturm. (P. 2826, Rabing, 3204). Sturm says that he knew the instant that exhibits "F" and "H" were put in evidence—November, 1883—that they would be attacked by the defendants as forgeries, for at that time Mr. Rabing made the remark "patchwork." (P. 1677, q. 63).

Sturm claims to have had a consultation with his attorney, Mr. Parsons, on March 20, 1868, about five months after these papers bear date, on the subject of his personal liability to defendants for the value of the lost goods. He says that he showed Parsons all the papers bearing on the subject, namely, the letter of consignment and invoice, and that he made a memorandum of this conversation, which he sets out. (P. 298.) He did not show Parsons either "F" or "H," nor tell him that such papers were ever executed. If he had had them at that time, there would have been no discussion as to his liability. His explanation for not showing them to Parsons is that he had wholly forgotten their existence. Forgotten them within five months from the date they were executed! These papers show, as Sturm says on page 1366, "rough usage and punishment." If they received this treatment innocently, by being carried and chafed against other papers, as Sturm and some of his experts claim, they must have received it before Sturm's return from Mexico in March, 1868. Sturm claims that the Stocking brothers and his brother Fred, who he says had charge of his papers while

he was in Mexico, were assisting him on his return in the insurance matters. If Sturm discussed with Funke and Parsons, as he claims, the subject of his personal liability for the lost goods, Fred and Stocking must have known it at the time. It is marvelous that one or the other of them did not end this discussion by producing these papers. But they also had "forgotten" their existence. These papers, if they were worn out in some one's pocket, were necessarily so worn by either Fred Sturm or Stocking. Fred Sturm was living when the papers were "found among Robert's papers," but he was not put upon the stand to tell what he knew of these papers in 1867.

Sturm tried to prove the existence of these papers in 1867 by his witness Tifft. Tifft says that he will not say that he ever saw either of them, but he has an impression that he saw Fred Sturm have them in New York about a month after Sturm went to Mexico in 1867, and after it was known that the "Keese" had been lost. How exhibit "F," which was signed on board the steamer, could possibly have been among Sturm's papers in New York before Sturm's return was never explained. The testimony of Mr. Tifft needs only to be read to show that he has no recollection of having ever seen either of these papers until 1883, after they were "found." (Pp. 1518–1522.) He says that if he saw Fred have them it was when Fred was looking for a lost letter belonging to General Sturm. Fred Sturm was not called to give his version of this supposed transaction. Tifft's "impression" is that Wilbur F. Stocking was present when Fred was searching for this lost letter. (Pp. 1511–1517.)

Sturm produced in evidence, in August, 1882, a diary entry or memorandum, dated October 11, 1867, the date of exhibit "H." It is set out on page 476. It does not mention exhibit "H," although they treat of the same subject. It is more than improbable that Sturm, if the diary entry itself is genuine, should write out a verbal agreement without mentioning the fact that it resulted in

a written contract. If he had a written contract, it is equally improbable that he would have written out a memorandum of the verbal agreement on the same subject made at the same time. The diary entry was in a memorandum book "exhibit G No. 18," at pages 27 and 28. (P. 476; q. 579, *et seq.*)

He probably had not conceived the idea of fabricating exhibits "F" and "H" when, in 1882, he produced this diary entry of October 11, 1867. Sturm tried to supply this missing link by "finding" in his brother's papers exhibit "E," a paper from Johnson & Higgins's agency, upon the back of which were "copies" of "memoranda." On this paper was a "copy" of the memorandum of October 11, 1867, which Sturm had set out in 1882, and following it was a "copy" of another memoraudum of the same date which he had up to that time not referred to, and the ORIGINAL of which was never accounted for. In this second memorandum of October 11, 1867, produced only by "copy," and then not until after exhibit "H" had been produced, was found in the last line above the complainant's signature this language: "FUNKE AND I HAVE AGREED ABOUT THE DIVISION AND EVERYTHING ELSE, *per receipt of to-day herewith.* H. Sturm. Copy. See, also, M. B., pp. 27 and 28, and diary entry October 13, 1867." (P. 1311.)

This "copy" says that at pages 27 and 28 of memorandum book (exhibit G, No. 18, record pages 476, 477), will be found the originals of two memoranda, dated October 11, 1867, but that book only contained the first of these two memoranda, as will be seen by the court when appellant shall produce the book at the oral argument. Where the original of this belated "copy" of the second one was, if there was an original, was not disclosed in the evidence. The defendants reserved an objection to incompetent testimony at the conclusion of Sturm's evidence of 1883. (P. 1396.)

Sturm's memorandum of October 11, 1867, as found in his memorandum book and as produced in evidence in 1882, was inconsistent with the theory of a written contract having been executed on that day; therefore, he produced from his "deceased brother's papers" an amended verson of his diary entries of that date, labeled "copy."

Sturm also produced a memorandum, which he says he made on October 25, 1867, the day "F" bears date, as to what passed between him and Funke on board the "Wilmington." If exhibit "F" was as Sturm claims written and signed then and there, the memorandum was superfluous, and as a diary entry the memorandum is singularly and essentially defective in that it does not mention "F." This diary entry had been put in evidence and set out at length by Sturm in 1882, so that in 1883, when "F" was first produced, the memorandum could not be amended. (Pp. 319, 320.)

APPEARANCE OF "F" AND "H."

The paper on which these instruments are written shows at a glance that parts of the surface of each have been tampered with, and this is apparent even from the photographs taken in November, 1883. (P. 3203, q. 646.) In exhibit "F" the ink in every part of the writing, save the signature, has "scattered" and run into the paper, as though its surface at the time it was written upon was rough. Much of the writing is underscored, and wherever the underscoring coincides with a fold in the paper, as it does in some places, the underscoring line is much broader than at any other point, showing that the ink spread through the broken part of the paper. Many of the letters have the appearance of having been "painted" or gone over a second time with the pen. The paper covered by the signature is uninjured; its surface is not chafed even, but is natural at that point. Beginning at the left of the first letter in the word "Hermann" and following the letters of the signature to a point just to the right

of the word "Co.," is a line which rises and falls with the sizes of the different letters, and within this line the paper is perfect, which can not be said of any other part of its surface. This shows that at some time this signature has been protected, while the surface of the remainder of the paper was being changed into its present condition. The same remarks apply to "H" with even greater force. The surface of "H" is in its original condition at no point where it is written upon except at the signature and at the blue seal at the left and toward the top of the paper. This is "laid writing paper." Such paper is readily distinguished in that it appears to the eye to be ribbed. This appearance is given to it by passing the stock while damp through a wire covered roller; the wires leaving parallel lines upon the finished paper. The paper is rolled again and calendered, but the lines are not obliterated. (H. V. Butler, an experienced paper maker, pp. 2816, 2817). Exhibit "H" shows these laid lines, as does the photograph of it, only at the point where the signature is, where the blue seal is, and around the top margin where there is no writing. At all other points the "laid" lines are obliterated and the paper is of a different color. The left stroke of the letter "H" in the word "Hermann" and the top of the capital "B" in the word "Boker" and almost the whole of the word "Co." in the signature have been torn out. The fracture indicates to the eye that the force was applied either by pressing against the under side of the paper, or by pulling a sticky substance from its surface. Within a line made by connecting these holes around and above the signature, the surface of the paper is in its natuarl condition. The surface of the paper at the blue seal is also natural; but there again it has been so treated that the part upon which the seal is impressed has been all but pulled out of its place. There are no holes in this paper except as indicated, viz., around the margin of the signature and at the blue seal. Even the photograph indicates that the surface of the

paper on which "H" is written has all been chafed and roughened except at the signature and seal. The writing in the signature although unusually coarse and heavy is sharp and distinct, while in the writing of all other parts of the instrument the ink has spread or scattered through the fiber of the paper. The paper at all points where it is written upon, except at the seal and signature is much lighter in color than at either of those two points.

Professor Doremus, speaking of "H," says it is a mutilated piece of paper; it is not only discolored, but unequally discolored in different parts. The lightening up at the left side looks as though produced by mechanical or chemical agency; as though produced with a little pumice stone or by the application of sulphuric acid. Certain words, pointed out by the witness, he says, have a blurred appearance, as though the writing had been made on a rough surface, a surface from which the calendering had been removed by mechanical or chemical means. (P. 2762.) Professor Doremus said that the surface of the paper where the signature is does not seem to have been disturbed as has the remainder of it (p. 2765, q. 44); that in his opinion either mechanical or chemical means have been applied to the paper; that the paper has been artificially stained with some coloring agency, such as light coffee and water or a little tobacco juice, or something of the kind. Professor Doremus describes how ordinary writing can be removed from paper chemically, and says that that was the favorite method employed by a noted forger named Spence Pettis. (Pp. 2762-2766.) Sturm and Wood had several consultations with this man Pettis, pending the insurance trials. (Wood's testimony pp. 1049–1054, 1101–1121, 1191–1196. Sturm, p. 862-876.) Professor Doremus stated that he could submit these papers to a chemical test, which would not efface any part of the writing upon them, but which would restore parts of any writing removed chemically. The appellant refused to allow the test to be made, stating, by implica-

tion, that he wished this test to be made by experts in Indiana, in the presence of the trial court. It never was made. (Pp. 2772, 2773.)

Mr. Albert S. Southworth, of Boston, an expert in handwriting for twenty years, testified that in his opinion the paper had been honed down to remove writing therefrom except at the place of signiture, where the paper is natural; that the writing of the body of the instrument was done upon an abraded or roughened surface; that the "laid" lines above the signature have been erased. (Pp. 2647–2660.)

Dr. W. B. Fletcher, one of Sturm's experts, testified (pp. 1994–2028) as to the appearance of these papers under the microscope. He admits that the papers are not in the same condition where the signatures appear as they are elsewhere throughout. He says that he attributes this difference to the fact that these papers must have at that point "been better protected from moisture, heat and friction than at other parts;" that he finds some evidence of friction over the signatures, but none of moisture or of mould-producing conditions. (P. 208, qq. 317-321).

Q. 322. "Did you not regard it as remarkable, Doctor, that the paper should have been preserved practically intact at that point and disturbed throughout its other portions?"

A. "I do." (P. 2008).

Dr. Henry Jameson, an expert in microscopy, one of defendants' witnesses (p. 3380), said, respecting exhibit "H," that he found the surface of the paper abraded at different points as is shown by the texture and color of its surface, and by the removal of the "laid" lines; that the abrasion is unequal in different parts of the paper; that no abrasion has occurred at the place where the signature is; that the surface of the paper there is smooth and seemed to be covered with some gummy substance; that he found no evidence of vegetable mould on the paper; that the evidence of such mould would be the fungus growth itself; that the paper has generally a dirty, yel-

lowish, brown color, more noticeable in some parts than in others; that the writing in the signature lies smoothly on the surface while that in the body of the paper is exceedingly irregular as to its mechanical condition upon the surface; that in the surface of that part of the paper the fibres stand up irregularly; it has been thinned down at certain points and there the ink has spread, making the outlines of the letters irregular; that friction of the surface of calendered paper upon itself in ordinarily handling or carrying of papers would not noticeably impair the surface and would not produce the condition found in "H." (Pp. 3380–3383).

Dr. Newcomer, a microscopist (p. 3470–3471), one of the defendants' witnesses, testified that he found no evidence of vegetable mould; that there was evidence of a disturbance of the surface of the paper between the lines which vegetable mould, if it existed, would not produce. This witness and the several following were limited in the examinations of "H" and "F," by an order of Court, to such examination as could be made of them while framed and under glass.

Professor Hurty, a chemist and microscopist, one of defendants' witnesses, said that he found no evidence of vegetable mould on the papers, and their appearance could not be produced by such mould; that he found between the lines and between the letters, marks, as he believes, produced from prior writing; that if vegetable mould had existed when complainant's experts examined the papers, it would still be present, and the process of sealing the exhibits under glass would have preserved the mould. (Pp. 3495–3498.)

Professor John M. Coulter, professor of biology, who has done extensive work for the United States government, was examined by the defendants, and said that he found no evidence of fungus growth, and that the abraded appearance of the surface of the papers could not have been produced by a folding and chafing of the paper upon

itself; that that appearance would not be produced by vegetable mould; that vegetable mould does not stain the surface on which it is, and when color is seen produced by vegetable mould it is while the plant is still there.

TYPE.

When exhibits "F" and "H" were first produced November, 1883, they were produced in company with another paper marked exhibit "E F," of November 12, 1883, complainant's No. 29. This paper was between "F" and "H," the three being pasted upon one large sheet of paper. Exhibit "E F" had no natural connection with either of the other two. It was a receipt signed by Boker & Co. to Sturm for $86,000 of Mexican bonds, which defendants took on September 20, 1867, in payment for arms sold outright to Sturm. (P. 1396.)

This paper had been introduced by complainant in 1881 in Mr. Funke's deposition and then identified, as is shown upon its face, as exhibit "C, December 19, 1881." (P. 970) Its genuineness was then admitted and was never afterward denied. The production of the three papers together led to an inquiry as to what, if anything, they might have in common. Nothing was discovered by defendants except that upon both exhibits "H" and "E F," as produced and copied in the record in 1883, the printed word "MEMORANDUM" appeared at the left side of the paper. "E F," when introduced in 1881, was not set out, but was merely identified. (P. 970). This led to an inquiry into the history of the type-face from which the word was printed, for it was apparent at a glance that the word in the two exhibits was printed from the same type. This examination resulted in the proof of the following facts: In 1873 Charles E. Heyer, then an engraver of type-faces for the Boston Type Foundry, first designed and produced a style of type called "copper-plate italic," which was patented by the Boston foundry. (Heyer, p. 3315.) This face was not in existence before that date. Between 1873

and 1875, Marder, Luse & Co., type-founders of Chicago, produced a type resembling the Boston type. In 1877, Heyer went from Boston to Chicago and took service with Barnhardt Bros., proprietors of the Great Western Type Foundry of Chicago, with which he was still connected in 1884, when examined in this case. In 1878, Heyer produced for the Great Western foundry a type similar to the Marder, Luse & Co. type, but technically speaking, different from it, and called this type "legal italic." A paper with the word "MEMORANDUM" printed upon it, marked "Exhibit No. 2, Charles E. Heyer, William F. Capitain, December 12, 1884," was offered in evidence by defendants (p. 3317), that word being printed from Heyer's Great Western type. Heyer says that his company desired a type that would differ from and be an improvement upon the Boston type of 1873 and the Marder-Luse type of 1875. He says that his type differed from those types in that his capital A had a straight horizontal line through it, whereas the Marder-Luse A had a scroll line through it; that his effort was to produce a plainer face more adapted to legal work; that at the time he produced his type, in 1878, there was nothing similar to it in this country or elsewhere except the Boston and Marder-Luse types. He explains in answer to question 35, *et seq.*, page 3314, that the Boston letters making up the word "Memorandum" would differ from the Marder-Luse letters in the same word in that the types of the letters "M," "N" and "R" would each have at its left side an ornamental curved line; that he had added such curved lines with a pen in exhibit No. 1. Mr. Heyer was shown a photograph of "H," which, by agreement, was to be treated as the original, and stated that the printed word appearing in the photograph was printed from his type, the Great Western foundry type, which was cut in 1878 and was put upon the market in 1879. He says that the word printed upon "H" was not printed with type in existence prior to 1878. (Pp. 3312–3318.) He says he gets his dates partly from memory and partly

from his memorandum book, where he entered his charges for cutting the type. (P. 3323.)

William F. Capitain, a type cutter of Marder, Luse & Co., was examined by the defendants. (P. 3327.) He says that he was in business in Boston from August, 1873, to September, 1874; that he knows the "copper plate italic" type of the Boston foundry, and knows it was first produced between 1870 and 1873, and was cut by a man named Heyer, now with the Great Western foundry; that prior to the production of the Boston type, he knows of no letter of that style in this country or in Europe, and that he was then, and is still, expert in the business. Exhibit No. 1 of Heyer (p. 3315) was shown him, and he says that that correctly represents the Boston; that the distinguishing feature of the Boston type are the "hooks" at the tops of the letters, in place of straight lines; that exhibit No. 2 of Heyer (p. 3317) was printed by him, Capitain, the morning he was examined; that No. 1 was printed from Marder, Luse's "circular italic pica" type, and that No. 2 was printed from Barnhardt Brothers and Spindler's legal italic, the line of type being furnished by defendants' counsel, which line of type he produces and binds with tape and parchment, and labels with his name, and which the defendants then offered in evidence. He also produces a similar line of the Marder, Luse type, which he labels, binds and marks, and offers in evidence. He says that the next type resembling the Boston type was the circular italic of Marder, Luse & Co., of 1875, from which exhibit No. 1 was produced; that the Marder, Luse type differed from the Boston type only in eighteen capital letters (he describes the differences on page 3330); that Marder, Luse & Co. were paying a royalty for the use of the Boston type, and that he, Capitain, in 1875, designed the Marder-Luse type, following as a model the Boston; that afterwards, between 1878 and 1880, Barnhardt Bros. & Spindler brought out their type. He is handed a sheet from a specimen-book

of Barnhardt Bros. & Spindler, and points out the upper half of the page as being the style of type from which exhibit No. 2 was printed. The page handed him was exhibit No. 3. He says that in the year 1867 there was no type in existence that would produce the impressions found upon the photographs. (Pp. 3328–3332.)

John Marder, of Marder, Luse & Co., of Chicago, was examined by defendants (p. 3337) and testified that he had studied the productions of type foundries of this country and Europe ever since he had been in the business—29 years; that "copper-plate italic" was first produced prior to 1875, and after 1867, by the Boston foundry; that up to that time he knows of no similar type produced in this country, England, Germany or elsewhere, and that he is just as positive on the subject as he can be of a matter as to which he believes he has full knowledge; that the Boston letter was a plain letter excepting its "dots" and "kerns," meaning a letter that "hangs over" on one side or the other. He examines exhibit No. 1, and says that the letters as built out with pen and ink fairly represent the Boston type. He examines exhibit No. 2, and says that it is the type of Barnhardt Bros. & Spindler; that Marder, Luse & Co. produced their type, which printed No. 1, in 1875, for the purpose of getting a type a little plainer than the Boston type, and that Capitain was the designer and cutter, and that about two years later Barnhardt Bros. & Spindler produced their type seen in exhibit No. 2, and that that style of type was not in existence before that time. (Pp. 3337, 3341.)

Alson E. Barnhardt, of Barnhardt Bros. & Spindler, testified to substantially the same state of facts as to the history of these types. He further said that a paper presented by defendants' counsel was an invoice or bill from his foundry, dated March 28, 1882, against Ketcham & Wannamacher, of Indianapolis, Indiana, for goods sold them, and he sets out the bill. He says that the third

charge in the bill is for one font "pica legal italic" type, the same type of which he has been speaking in his testimony. (Pp. 3341–3346.)

The history of this font of "pica legal italic" is as follows: In June, 1882, Dynes & Greer, job printers in Indianapolis, borrowed from S. E. Van Horn another printer, a specimen book of Barnhardt Bros. & Spindler, and from it selected some type to be purchased. The book borrowed is "exhibit No. 6, A. E. Barnhardt, December 12, 1884" (p. 3343); that they selected from page 139 of the book "pica legal italic," the line in the specimen book selected reading, "we take pleasure," etc.; Dynes & Greer purchased a font of "pica legal italic" type so selected from Ketcham & Wanamacker, of Indianapolis. (Van Horn, pp. 3642–3646.) In February, 1883, Dynes & Greer sold their establishment to CLINT. WEST, who took possession of the office, and who at once removed it and its belongings to No. 117½ East Washington street, Indianapolis, near to the south-east corner of Washington and Delaware streets and near by the office of the German Mutual Fire Insurance Company, where he remained about a year, doing a job printing business and publishing the "Grand Army Guard." This office was then removed to 30 and 32 Thorpe Block. West took in two associates, and formed the "Guard Printing Company." About June 20, 1884, Van Horn bought the establishment, its type, etc., which he owned when examined. The font of type of "pica legal italic" was in the property delivered, and was still in Van Horn's possession when he was examined. In September, 1884, Van Horn was shown by defendants a photograph of the printed word "MEMORANDUM," found in exhibits "H" and "E F," and said that he had type of that face, and thereupon set up the word "MEMORANDUM" from the font of "pica legal italic" referred to, and gave the defendants impressions therefrom, and gave the type forming the word to defendants, being the line identified by Capitain as Barnhardt Bros. & Spindler's, and from

which exhibit "No. 2," of Heyer & Capitain was printed. (P. 3647–3651.) The office of Clint. West, in February, 1883, was near Sturm's office, and Sturm and West were friends. (P. 3651.)

The defendants put an affidavit on file, showing the history of this type and asked for time to prove the facts. A few days after, Clint. West, who had not before visited Van Horn, came to his office and carlessly looked over his type until he came to the "font" in question, which he examined to some extent. During the time between the the filing of the affidavit and West's visit to Van Horn, West was seen in company with Sturm. (Pp. 3652–3653. See, also, Nichols, p. 3701 and p. 3739; Greer, pp. 3702–3707; Gerber, pp. 3707–3712; Sharpe, pp. 3742–3744; Cox, pp. 3790–3794.)

Appellant tried to rebut the testimony, as to the age of this type, with certain printers at Indianapolis: Hastings (p. 1602), Thudium (p. 1618 and 1667), Ketchum (p. 1636), Dynes (p. 1651). Hastings said that Exhibit Heyer No. 2 (Barnhardt "pica legal italic"), was not the same identical type as that found upon "H." When he came to point out the differences, they were only such as would exist between bad and good workmanship from the same type. He examined, in cross-examination, the printed word upon "H" and "E F," and concluded that they were not printed from the same face type. (Pp. 1609, 1610.) He compared the printing on "H" with that on "5 orders," dated in 1867, produced by Sturm, and said the type was different (p. 1610), and he points out the differences. Sturm could not support his theory as to type unless the word "MEMORANDUM" on all of his exhibits "H" and "E F" and the "5 orders" were all printed from one and the same face.

THUDIUM said the printing in Heyer No. 2 was very similar, but not the same as that upon Sturm's exhibits. This witness pointed out differences which are explainable by bad workmanship. He spoke of "general styles" of

type and of the age of such styles. He did not produce any type that would print Sturm's exhibits. (Pp. 1618–1621.) The same is true of KETCHAM (p. 1636–1648), and DYNES. (1651–1666.) These witnesses found type that they said was different from Sturm's exhibits, but resembled more nearly the type on those exhibits than did Heyer No. 2.

Such proof as this does not rebut the positive statements of defendants' witnesses, who were experienced type founderymen and type cutters.

We have caused the printed word "MEMORANDUM" upon the copy of exhibit "H" set out at page 230 of this brief to be printed from types from the font of "pica legal italic" purchased by Van Horn from Clint. West. We shall lay in this brief "half-tone" impressions of the photographs in evidence of exhibits "E F," "F," "H" and of the "5 ORDERS." The word "MEMORANDUM" appearing in these "half-tones" will be found to be an exact reproduction of the printing upon Sturm's exhibits. If the printed word "MEMORANDUM" in the copy of "H" set out at page 230 hereof is laid upon that word in any of the exhibits, or in the photographic or half-tone copies of the exhibits, and the two held in a strong light it will be found that the type is identically the same in every particular.

Exhibit "E F," as we have said, when offered by Sturm in 1881 was identified, but not set out. The defendants' counsel, during that sitting, caused an accurate copy to be made of every exhibit then so indentified but not set out in that examination. The copy of exhibit "C" of 1881 (being "E F" of 1883) so made was discovered not to have the printed word "MEMORANDUM" upon it. All of the copies of exhibits so made, and the evidence applying to them are found in Rabing's testimony of 1885 (p. 3807 *et seq*).

MODE OF THE FORGERY.

The complainant's counsel make their principal argument as to the genuineness of "F" and "H" under this

title. Their theory is that while the defendants from the very instant these exhibits were produced pronounced them forgeries and "pathchwork;" that if they, at any time in the evidence, vascillated as to the "mode" of the forgery, it follows that the papers are not forged, but genuine. This is clearly a *non sequitur*. There was but one person who actually knew the mode of the forgery, if the papers are forgeries—Sturm. We therefore turn the argument around; if Sturm vascillated in his theory of the production of these papers, as he had the facts at hand all the time, it does prove the papers forgeries.

Appellant's counsel attempted to show that H. B. & Co. were accustomed to keep in their office blank paper having this word "MEMORANDUM" printed vertically upon its left margin, and to thus trace into defendants' possession in 1867 the paper upon which exhibits "H" and "E F" are written. In the cross-examination of Mr. Boker in 1884 (p. 2599), appellant's counsel interrogated the witness as to whether or not defendants had in their store in 1867, such paper as exhibit "H" is written upon. Mr. Boker answered that he could not recall any such paper, and he believed they had none such. Appellant's counsel then asked question 1328. (P. 2600.)

X.-q. 1328. "If you now remember distinctly that you had no such printed paper in your office in 1867 you KNEW THAT THE FACT PROVED WOULD BE PERFECTLY CONCLUSIVE OF THE FACT THAT EXHIBIT "H" WOULD NOT BE GENUINE?"

Mr. Boker answerd that his impression was that they never had had such paper and that defendants had written over the country to their customers for a sample of such paper coming from their office, but none had been discovered.

When the complainant broke down in his effort to prove that this was H. B. & Co.'s paper, with his usual facility for changing front he proceeded to establish that this printed memorandum paper was not H. B. & Co.'s, but was paper that he, Sturm, kept in his office, in 1867, at 57 Broadway, New York. Inthe deposition of Tifft (p. 1472), Sturm produced what is known in the evidence as "THE 5 ORDERS."

They were orders by Sturm, in 1867, upon Corlies & Co. for Mexican bonds. On each of these papers, was printed vertically on the left margin, "MEMORANDUM," printed with the same type, and in the same unworkmanlike manner as the printing upon exhibits "H" and "E F." These orders were returned to Sturm by Corlies & Co., after having been "cashed" in bonds, as checks. Sturm then took the position that HE had written out at his own office both exhibits "H" and "E F," and had taken them to Mr. Funke to be signed (Sturm's testimony of 1885, pp. 1817, 1818). Sturm gives a very absurd theory in his testimony of 1885, as to how he *happened*, in drafting exhibit "H," to leave just sufficient room between the printed word "MEMORANDUM" and the writing above it for Mr. Funke to insert the defendants' blue seal appearing thereon and how it *happened* that in drafting the paper he arranged the writing in such way that it would conform to the periphery of the blue seal when it should be placed upon the paper by Mr. Funke. (See Sturm's testimony of 1885, pp. 1820, 1821.)

The writing upon the five orders antagonizes the printed word "MEMORANDUM." The defendants' experts testified that under the microscope the writing on these orders appeared *under* the printing.

The appellant's counsel, following the District Judge, asked why should Sturm forge TWO contracts so nearly alike in terms, as are exhibits "H" and "F"? This is sufficiently answered by another question: Why should H. B. & Co. execute two genuine papers so nearly alike as these are?

STOCKING MEMORANDUM.

Appellant's counsel try to borrrow a witness from the grave to corrobrate Sturm by designating some of Sturm's numerous memoranda found in a book in which Stocking's writing appears by the above title. It will be noticed that none of them are Stocking's memoranda. They are all Sturm's. Writing of Stocking, it is true, is found in the

same book, but none of his writing has been produced to support the complainant's theory. Appellant's counsel delight to say that Sturm's memoranda are "hedged" by Stocking's writing. We submit that it was Sturm that did the "hedging," and not Stocking.

Upon the foregoing considerations, the Circuit Judge was abundantly justified in holding, as he did, that both Exhibits "F" and "H" are forgeries, and the District Judge might have safely gone farther than he did when he said that upon the "direct evidence" he would hold them to be forgeries.

In view of the foregoing considerations, we submit that the Circuit Judge was right in his findings upon the pleadings and the evidence; that the evidence establishes:

1. That the contract between the parties in this suit was the written contract evidenced by the letters of September 18th and 20th and the enclosed invoice.

2. That no new contract between the parties was ever made.

3. That by the terms of the contract, Sturm was responsible for the goods, and in event of their loss he was bound to pay to Hermann Boker & Co. the value of the goods in gold.

4. That the conduct of the parties with respect to this contract was consistent with the interpretation thereof which made Sturm responsible for the consigned goods, and was not consistent with any other theory of interpretation.

5. That Hermann Boker & Co. were not liable to Sturm in any sum on any account.

The bill should therefore have been dismissed, and we respectfully submit that the decree dismissing it should be affirmed.

CLARENCE A. SEWARD,
WILLIAM D. GUTHRIE,
ALBERT BAKER.

October, 1893.

APPENDIX.

In the Circuit Court of the United States.

FOR THE DISTRICT OF INDIANA.

November Term, 1887. December 8, A. D. 1887.
Before HONORABLE WALTER Q. GRESHAM, and HONORABLE WILLIAM A. WOODS, Judges.

HERMAN STURM
vs.
FERDINAND A. BOKER,
HERMANN FUNKE
AND
FREDERICK SCHUMACHER.

No. 7178,
Chancery.

Now come the parties by their respective solicitors, and the Court being sufficiently advised in the premises as to its ruling upon the petition of the complainant for a rehearing, filed October 31, 1887, and then taken under advisement, doth find, the District Judge dissenting, that said petition be overruled.

It is therefore finally ordered, adjudged and decreed that said petition for a rehearing herein be and it is overruled.

And it is further ordered that the costs incurred by the defendants on account of such petition be taxed against the petitioner.

Office Supreme Court U. S.
FILED.
OCT 7 1893
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO. 14.

HERMAN STURM,
Appellant,

vs.

FERDINAND A. BOKER, HERMANN FUNKE AND FREDERICK SCHUMACHER,
Appellees.

Docket No. 13,551.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEES ON QUESTIONS OF LAW.

CLARENCE A. SEWARD,
WILLIAM D. GUTHRIE,
ALBERT BAKER,
Of Counsel for Appellees.

Supreme Court of the United States,

OCTOBER TERM, 1893.

TERM No. 14.

HERMAN STURM,
Appellant,

vs.

FERDINAND A. BOKER, HERMANN FUNKE AND FREDERICK SCHUMACHER,
Appellees.

Docket No. 13,551.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEES ON QUESTIONS OF LAW.

Statement.

The appellees have prepared and submit herewith an answer to the appellant's brief, and in this answer the evidence upon the issues and merits has been considered at length. The

truth as to the numerous questions involved in this controversy can be ascertained and determined by this Court only after a careful study of a record of 3,977 pages. It is, however, believed that well-established rules of equity jurisprudence and practice conclusively preclude any recovery on the part of the complainant and appellant, and that the application of these rules will render wholly unnecessary any extended discussion or analysis of the testimony.

The facts were carefully and exhaustively considered in the Court below, where the case was tried before the Honorable W. Q. Gresham as Circuit Judge, and Honorable William A. Woods as District Judge. The bill was dismissed by the Circuit Judge not merely for want of equity, but on the affirmative ground "that the equity of this case is with the defendants" (Record, p. 95). The District Judge dissented (p. 108), and the views expressed in this dissent summarize the grounds upon which the appellant hopes to succeed in this Court.

The specification of errors in the appellant's brief are (1) the general assignment of error in dismissing the bill for want of equity; (2) in holding that under the original contract of consignment the complainant was liable for the loss at sea of the consigned goods; (3) in deciding that the bill of complaint was based

upon a special contract made after the loss of the goods at sea; and (4) in finding exhibits "H" and "F" to be forgeries and deciding, that this fact of itself, in a court of equity, precluded any recovery on the part of the complainant.

I.

THE BILL WAS PROPERLY DISMISSED FOR WANT OF EQUITY.

The appellant's counsel, in the brief on file, do not discuss the first error, but urge that the decisive question in the case arises under the second error (see p. 2 h). This first error, however, presents the question upon which Circuit Judge GRESHAM placed such emphasis, namely:

"*He who comes into equity must come with clean hands,*"

or, as the maxim was originally expressed in the old books (Francis, Maxim II., p. 5),

"*He that committeth iniquity shall not have equity.*"

It is significant that the appellant's brief is silent upon this phase of the controversy.

The actions against the insurance companies were prosecuted, and the payment of the policies was ultimately compelled, upon the claim that

the legal title to the consigned goods was in the complainant Sturm by purchase; that the shipment was at his risk, and that he was liable to the defendants, Hermann Boker & Co., for the invoice value of the consigned goods, payable in gold. If the claim as made in the insurance litigation was true, the complainant concededly and indisputably has no cause of action in this suit. Sturm, in the course of that litigation, repeatedly swore that he was the owner of, and liable for, the value of the consigned goods; but he now pretends that these oaths were false and virtually confesses that the New York Courts were then deceived and the insurance companies defrauded for the benefit of himself and the defendants. The defendants deny this pretense under oath, and earnestly insist that the insurance cases were honestly conducted and the theory of recovery true, and that all parties in interest truthfully stated therein that Sturm was the legal owner of the consigned goods; that they were shipped at his risk, and that he was liable for the invoice value thereof, payable in gold.

Let us assume, for the sake of argument and for that purpose only, that the complainant's pretense is correct, and let it be conceded that the statements made in the insurance litigation were false and for the purpose of defrauding the insur-

ance companies. We would then have the case of a confederate or participant in a successful fraud, with no claim except as growing out of wilful perjury, praying a court of equity to reimburse him for expenses incurred in such litigation and to award him pay for his time and labor given to the consummation of his confessed fraud. It should dispose of the whole case to say that, within well-settled rules, such a complainant does not come into Court with clean hands ; that it is against the policy of the law to enable either party to profit by such a fraud ; that a court of equity will not intervene to give relief nor lend its aid to an accounting between litigants so situated, and that it leaves the parties where it finds them.

There is no question whatever as to the perjury of Sturm and the defendants in the insurance litigation *if* the complainant's present claim be true. No matter what excuse be pleaded, it was wilful and deliberate perjury ; the Courts were deceived ; the insurance companies defrauded. The fraud consisted not only in establishing in the judicial proceedings then pending that Sturm was the owner by purchase and that the shipment was at his risk, but also that the invoice was payable in gold. The appellant's counsel confess (appellant's Brief, p. 60) that it was

"reprehensible" for Sturm to have testified in the insurance litigation that the bill was payable in gold. The purpose of so swearing was to charge the insurance companies the premium on gold at forty-five per cent., viz., $17,949.42.

In the dissenting opinion, the District Judge said (pp. 105, 107, 108):

> "In other words, I am firmly convinced that on the face of this contract, as it is written, General Sturm has a right to recover in this case, *no matter what perjury has been committed, no matter what forgery.* * * * Later Hermann Boker & Company did represent to the insurance companies that the goods were sold to Sturm and compelled Sturm to lend countenance to the assertions, but confessedly this was not so. * * * *Yet General Sturm in the insurance cases swore that he was the owner of the goods.* Counsel for defendants deny that themselves. They say that is not true, but that the goods were simply consigned to him and consigned at his risk. * * * *General Sturm made three statements in those suits with regard to the ownership of the goods, which counsel on both sides claim or concede to have been mistaken or untrue.* He swore he was the owner, and in one instant added that he was liable to Hermann Boker & Company for the goods until they were returned or sold. Well, now, then, *whether that was wicked perjury or not I do not care to discuss.* * * * But what explanation is there of this false testimony? It is this: Hermann Boker & Company, before Sturm got home, with a view to fasten the liability on the insurance companies, took position on that subject. There arose in their minds a fear that if General Sturm was not to be regarded as the owner

of the goods the insurance taken in his name would be held invalid; and so, for the purpose of being sure that the policies could not be attacked on the ground that General Sturm did not own the goods, they asserted, before General Sturm got home, that he did own the goods, and they forced General Sturm —the situation forced General Sturm into acquiescence in the same view. He could not take issue on that fact without putting all his policies in peril. *It may have been dishonest not to do it*, but the defendants are more responsible than he."

Judge CLAYPOOL: "In the testimony General Sturm says he was the owner on consignment."

Judge WOODS: "I do not care to go into any refinements on the subject. *I am willing to concede that General Sturm has been untrue in this particular*, but it is insisted that a phrase in the false expression must now be treated as true."

It must be borne in mind that this perjury in the insurance cases was for the purpose of fastening liability upon the insurance companies and recovering on the basis of legal ownership and liability, on Sturm's part, for the value in gold of the consigned goods; that this position was vital to the insurance cases as then framed, without which nothing could have been recovered, because he could not have established sufficient insurable interest, and that the parties have succeeded in collecting from the insurance companies on that basis. It matters not from what aspect we look at the bill of complaint herein: whether brought for an accounting of the $109,126.27 collected from the insurance companies, or

brought to obtain reimbursement for expenses and payment for services. The money was collected by perjury; the expenses were incurred and the services rendered in the perpetration of a fraud. To repeat, if we accept, on the one hand, the defendants' contention, supported by their own testimony under oath, that the claim in the insurance cases was honest and based upon the assertion of the truth, then the complainant has no claim for contribution to expenses, &c., and this suit is disposed of. On the other hand, if we accept the complainant's pretense, supported by his oath, that the statements in the insurance litigation were false and known to be such, not only by him, but by the defendants, who participated in the fraud, the case is equally disposed of, because a court of equity will not aid a complainant seeking an accounting under such circumstances.

In pari delicto, potior est conditio defendentis.

The latest case in this Court upon the principle embodied in the maxim above quoted is *Dent* vs. *Ferguson*, 132 U. S., 50, 64, 66, 68, where Mr. Justice LAMAR, delivering the unanimous opinion of this Court, said:

> "The question arises—if a person conveys his property for the purpose of hindering, delaying or defrauding his creditors, and for eleven years acquiesces and concurs in the devices, collusive suits and impositions upon the Court in furtherance of

this purpose, without taking a single legal step to annul said conveyance or to stop such proceedings, will a court of equity aid him or his heirs to recover the property from the grantee or his heirs after the fraud is accomplished? This Court has answered that question in the negative in *Randall* v. *Howard*, 2 Black, 585. * * * We find no authority for the idea that it is the province of a court of equity to make a fraudulent debtor the special object of its favor, because he has not received a large enough consideration for his 'confessed fraud.' That Court is not a divider of the inheritance of iniquity between the respective heirs of two confederates in fraud. Mr. Justice Baldwin, delivering the opinion of the Court, in *Bartle* v. *Coleman*, 4 Pet., 184, 189, uses the following language: 'The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud; which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other; or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws.' Or, as Chancellor Walworth states it: 'Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct.' *Bolt* v. *Rogers*, 3 Paige, 154, 157. * * * The district judge is mistaken when he says that 'one of the objects of the bill is to prevent the defendants from reaping the lion's share of the benefits of this confessed fraud.' The object of the suit,

as clearly and explicitly stated in the bill, is to secure to the complainants the entire benefit of the confessed fraud by having all the property, with all the intermediate rents and profits added, free from all liens and liabilities, returned to them. The real complaint is that Dent, the fraudulent vendee, refused to perform his part of the fraudulent understanding with Ferguson, the fraudulent vendor; and the avowed purpose of the suit is to compel the defendants to perform it. The prayer cannot be granted without overturning established principles of equity."

In *Creath's Administrator* vs. *Sims*, 5 How, 192, 204, Mr. Justice DANIEL said:

"In reviewing the grounds relied on by the complainant as the foundation of his claim to relief, the second and third, being coincident with the order and progress of the transactions between the parties as stated in the bill, and evincing especially the circumstances and the attitude under which this approach to a court of equity has been made, will be first considered, and this examination will be premised by stating the followiug principles of equity jurisprudence, which may be affirmed to be without exception;—that whosoever would seek admission into a court of equity must come with clean hands; that such a Court will never interfere in opposition to conscience or good faith; and again, and in intimate connection with the principles just stated, that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defence shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice. The

effect of these principles upon the statements of the complainant is obvious upon the slightest inspection. The complainant alleges, that the obligation to which he had voluntarily become a party was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfilment. This prayer, too, is preferred to a court of conscience, to a court which touches nothing that is impure. The condign and appropriate answer to such a prayer from such a tribunal is this;—that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto;* you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you."

In *Wheeler* vs. *Sage*, 1 Wall., 518, 530, Mr. Justice DAVIS said:

"The Court was imposed on, and a combination formed, the object and direct tendency of which was to secure the title to the valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors.

"A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies. The maxim, '*in pari delicto potior est conditio defendentis*,' must prevail."

In *Selz* vs. *Unna*, 6 Wall., 327, 336, Mr. Justice CLIFFORD said:

"Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate as a fraud

upon the private rights and interests of third persons."

In *Kitchen* vs. *Rayburn*, 19 Wall., 254, 263, Mr. Justice STRONG said:

> "The complainants, then, do not come into Court with clean hands. They are seeking the benefit of a contract obtained by their fraud, or by the fraud of Kitchen. Hence they can have no standing in a court of equity. Such a court will not lend its power to assist or protect a fraud. It will not even enforce an unconscionable bargain. In *Bein* v. *Heath* it was said to be a principle in chancery 'that he who seeks relief must have acted in good faith. The equitable powers of this Court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity.' For this reason, if for no other, the plaintiffs cannot succeed. They are seeking in a court of equity to derive an advantage from their own wrong."

The same doctrine was also declared in many other cases in this Court, among which the following may be particularly referred to:

Bartle vs. *Coleman*, 4 Pet., 184, 187, 188;

Sample vs. *Barnes*, 4 How., 70, 74;

Hanauer vs. *Woodruff*, 15 Wall., 439;

Higgins vs. *McCrea*, 116 U.S., 671, 685:

Cragin vs. *Powell*, 128 U. S., 691, 700.

See, also,

Prince M. Co. vs. *Prince M. P. Co.*, 135 N. Y., 24, 38.

The English cases are equally interesting and decisive. In *Stephens* vs. *Robinson*, 2 Cr. & J., 209, the plaintiff had filed an affidavit, required by statute, in which he had sworn that he was the sole proprietor as well as the printer of a certain newspaper. Subsequently, he sued the defendants upon the theory and claim that they were the proprietors, and that he had no interest therein. The action was at law. Baron Bayley dismissed the case and said at p. 212:

> "Here the plaintiff takes upon himself to swear that he is the sole proprietor, as well as the printer. The ground upon which he seeks to charge the defendants is, not only that he is not the sole proprietor, but that he is in no way interested in the paper. I am of opinion that he cannot be allowed to recover against these defendants as proprietors, in opposition to his own affidavit."

In *Harmer* vs. *Westmacott*, 6 Sim., 284, 290, Richards, the proprietor of a newspaper, was imprisoned, and, believing it best and to his interest that another person should appear to be the owner of the paper, procured one Bowden to make a false affidavit at the Stamp Office, as required by law. Bowden subsequently sold the paper to the defendant, and an action was brought by Richards' assignee in bankruptcy to set aside the sale on account of fraud. Vice-Chancellor SHADWELL, in dismissing the case, among other things, said:

> "That Richards was privy to Bowden's acts, is

> indisputable. It is plain, therefore, that they conspired together to do that which the policy of the law forbade; for they agreed to represent that Bowden was the sole proprietor of the paper: and that puts an end to the whole of the plaintiff's case."

In *De Metton* vs. *De Mello*, 12 East, 234, 236, a cargo was shipped at Lisbon for Nantes on board a Portuguese ship by the plaintiffs, who were a Frenchman and a Swiss, but who carried on business at Lisbon and associated with them was the defendant, a Portuguese. The cargo was captured by a British cruiser and libelled in the Court of Admiralty for condemnation as enemy's property. A claim of property was put in by the defendant as a Portuguese on his own account, and the cargo was ordered to be restored to him, which was accordingly done, and he disposed of it in England and received the proceeds. The plaintiffs sanctioned the claim of the defendant that the cargo was his private property, but at the same time received from him a letter acknowledging that the property of the cargo was exclusively in them, and that he had only lent his name for the purpose of neutralizing the property. Lord ELLENBOROUGH C. J., nonsuited the plaintiffs on the ground that it did not lie in their mouths to gainsay that the property of the cargo was in the defendant after he had, with their privity

and direction, put in a claim as owner before the Court of Admiralty. In the opinion the following will be found :

> "I think that the plaintiffs are estopped by their own act in setting up and establishing in the Court of Admiralty the claim of De Mello to this property from now turning round and insisting upon it as their own. If they could have shewn that De Mello had acted tortiously as against them in setting up a false defence and claim to the cargo as his property in that Court, that might have served them; but, on the contrary, it appeared that he had acted all through with their privity and consent. De Mello may have behaved like a rogue to the plaintiffs; but both plaintiffs and defendant have behaved wrongfully as against this country in colluding to make French property appear to be Portuguese in the Court of Admiralty upon a question of prize as against the captors."

In *Post* vs. *Marsh*, L. R., 16 Ch. Div., 395, 406, the plaintiffs proposed to publish a guide book of London with the title page stating that it was edited by one Kenney, who had edited other guide books and who had considerable experience and reputation in this species of literary work. Kenney, however, took no part in editing it. There was some question as to the agreement between the parties, and the Court said that it was an insuperable objection to giving the plaintiffs relief that they had insisted throughout upon a form of title page which was not justified and which would be a fraud upon the public.

In re Great Berlin Steamboat Company, L. R., 26 Ch. Div., 616, one Bowden placed a sum of money to the credit of the company at its banker's, so that it might have a creditable balance in case of enquiries from certain Berlin bankers with whom the directors were endeavoring to place a number of the shares of the company, it being agreed that the same was not to be used for the general purposes of the company, and that the company was merely to hold the same as trustee for him. Some of the money was drawn out by Bowden's consent, but there was a balance still standing to the credit of the company when a compulsory order for winding up was made. The evidence showed that the balance in dispute was part of the money which Bowden had advanced. It was, however, held by all the Lords Justices that he was not entitled to relief, on the ground that the deposit was made for a fraudulent purpose, and that while, perhaps, he might have repudiated it and recovered the money before it had ceased to be probable or possible that the scheme might be carried out, he could not do so after the commencement of the winding-up had put an end to the purposes for which the money was deposited.

II.

THE CONSIGNED GOODS, UNDER THE ORIGINAL CONTRACT BETWEEN THE PARTIES, WERE SHIPPED AT STURM'S RISK, AND, UPON THEIR LOSS AT SEA, HE WAS LIABLE TO PAY FOR THE SAME AT THE INVOICE VALUE THEREOF.

The bill of complaint was originally based upon certain express agreements made on the 21st and 27th of March, 1868, after the loss of the consigned goods at sea, under which agreements (first) the goods were to be treated as sold to the insurance companies, thus freeing Sturm from further liability, and (secondly) the expenses of the litigation were to be borne *pro rata*, and Sturm was to be paid for his personal services (Record, pp. 5–6). In view of these express agreements, if made, it really mattered not in whom the original risk was, for after the loss Sturm swore that the parties practically had a settlement—accord and satisfaction—under which he transferred $40,000 of policies in full settlement of all claim against him. These express oral agreements are apparently abandoned, and the complainant, changing front, seeks to mend his hold by standing upon the original contract of consignment, and challenging as error the finding of fact and law in the insurance cases and in the

Court below, that the shipment thereunder was made at Sturm's risk and that he was liable to pay for the same at the invoice value thereof. The whole case is now claimed to rest on the assertion that the terms of the original consignment made the shipment of the consigned goods at the risk of the defendants, and not of the complainant, and it is admitted that if this construction be untenable, the complainant is entitled to recover "but little, if anything" (appellant's brief, p. 22).

The original arrangement for the consignment of the goods in question was oral and subsequently embodied in the letter of September 18th, 1867, from Hermann Boker & Co. to Sturm *and the accompanying invoice.* The merchandise to be shipped was contraband of war, and Mexico was then in a state of revolution. Such a consignment involved extraordinary perils. The defendants, therefore, demanded an absolute obligation for the return of the goods to them, free of all charges and expenses, in case no sale were effected, and stipulated that the shipment should be for the account and at the risk of Sturm. It was, in effect, the familiar transaction of a "contract of sale or return," which has been interpreted by the Courts to constitute a conditional sale with the option of a return of the goods, but with the title and risk meanwhile in the vendee. The

contract as reduced to writing is inartificially expressed ; but, taken in connection with the *invoice* and the acts of the parties and with their practical construction during the nine years of the insurance litigation, there can be no reasonable doubt that the intention at the time was to vest the property in Sturm as purchaser and to ship at his risk. Whatever question there might have been as to the intention of the parties to transfer the legal title to Sturm, there can be none as to the fact that the shipment was at his risk unless the expression in the invoice, "forwarded for your account *and risk* per ———," is to be given no effect whatever. It is suggested that this phrase is abortive and signifies nothing simply because it is in print and the names of the vessels were not inserted. There were at least two vessels upon which the goods had been shipped ; other vessels might be used ; Sturm could forward as he saw fit ; the defendants had no control over the manner or method of shipment, and so far as appears, then knew nothing about the names of the vessels selected by him. It was their custom always to ship at the risk of consignees. Why should they vary that usage of their business and assume the risk of shipment in the case of a consignment attended with extraordinary risks ? The appellant's counsel admit that if the words "*at your risk*" had been inserted

in the letter of September 18th, 1867, "there could have been no contention about who should bear the loss" (appellant's brief, p. 9). Yet, the words were in the accompanying invoice, and there was, therefore, no necessity whatever for repeating them in the letter. The phrase is printed, but that furnished no reason or excuse for disregarding it. There is no inconsistency or conflict between the printed and the written parts of the bill or invoice, and printed stipulations are always enforced in the absence of any such inconsistency or conflict.

The appellant's counsel strenuously urge that the legal interpretation of the contract, and the real and true intent of the parties, require this Court to hold that Sturm was at no time, in no sense, liable for the loss of the goods at sea. To arrive at this conclusion, the practical construction of the parties during nine years of litigation must be brushed aside as erroneous or fraudulent. If Sturm was a simple bailee for hire, and as such not liable except for his own negligence, why did he insure and pretend to the insurance companies that he had an insurable interest by reason of his liability to the defendants? If he was not liable, and did not assume all risks of sea perils, is it improbable that the defendants would have neglected to insure the goods? If the shipment was not at his risk,

would he have accepted the bill with the statement printed in clear type, "forwarded for your account *and risk*"? This Court, moreover, is asked to give no effect whatever to these words, "forwarded for your account *and risk*," because they were the usual form of printed bill-head or invoice. If it was the custom to ship or consign goods at the risk of the consignees, is it not probable that the usual course of business was followed? There was no conceivable reason to change or vary the action in this instance of an extremely hazardous enterprise. Indeed, the acts of the parties, the probabilities, the dictates of ordinary business prudence, all point to the conclusion and support the inference that the shipment was to be at Sturm's risk, and that all parties so understood.

The words "for your account" were proper under the heading, "Mr. H. Sturm in joint acc't with Hermann Boker & Co.," because he was individually liable to them for the value of the goods or their return, and they had requested him to credit them the amount thereof "on consignment account." His interest on joint account could only arise in the event of a sale by him above the invoice price. In the meantime, he was responsible for their return; they were

shipped at his risk, and he was individually to bear all charges and expenses.

Prior to the letter of the 18th of September, 1867, and the delivery to Sturm of the invoice, he had himself interpreted and acted under the contract upon the assumption that the shipment was to be at his risk, for he had insured the consigned goods on his own account. The defendants, who were shrewd, prudent and careful business men, took no steps whatever towards insuring the goods on their own account. Had they had any doubt that the shipments were to be for Sturm's *account and risk*, they would, of course, have insured their interest on such a voyage. As to the value of the consigned goods, they had no insurable interest; the title and property were in Sturm. If this had not been so, Sturm could not have taken out the insurance as he did for the full value of the consigned goods. Throughout the insurance litigation, all parties testified under oath again and again that Sturm was the owner by purchase of the consigned goods and that the shipment was made at his risk. It is not necessary to repeat here the references to the proofs upon this point set forth at length in pages 12–34 of the answer to appellant's brief.

It must be remembered, as stated above, that this was a consignment of goods contraband of war and to a country where war was then

flagrant. The shipment involved unusual perils and might be attended with extraordinary expenses. The goods were delivered into Sturm's possession, to be shipped on vessels controlled by him. As the letter of September 18th, 1867, states :

> "Also it is understood that all these goods are shipped by you free of any expense to us, and that in case all or any of them should not be sold they shall be returned to us free of charge."

The Court might well hold that the delivery to Sturm of these consigned goods, to be shipped as he saw fit, but free of all expenses to them, upon an absolute obligation to return the goods to them "free of all charges," constituted a contract of "sale or return," and not of bailment, and made him liable for the value thereof, on the ground that the loss at sea was a probable contingency which he had agreed to assume, but which if he had not intended to assume, a prudent man should have foreseen and provided against.

As matter of fact, however, the oral contract had in this particular been most effectively interpreted and executed. He had insured the goods prior to the letter of September 18th, and the defendants knew it, for they write :

> "As you have insured these goods——"

And this insurance had been obtained in pursuance of the oral agreement, in practical per-

formance thereof, because (to use the argument of Sturm's counsel in the New York Court of Appeals in September, 1875):

> "Those goods were consigned under an arrangement which made the plaintiff reponsible for their loss; and that liability gave him an insurable interest."

The defendants did not insure the goods upon an extremely perilous voyage. No reason can be assigned for their omission to do so, except that the risk of the perils of the sea had been assumed by Sturm in his absolute obligation to return the goods free of expense and charges. When the letter of September 18th, 1867, was written Sturm had settled in the most unequivocal manner, by the clearest and most affirmative act, that he was responsible for their return and liable for their loss. There should be no reasonable doubt that all the risks of this hazardous enterprise were assumed by Sturm, and that the real agreement between the parties made him absolutely responsible for the return of the goods free of all charges and expenses, or, in case of loss, liable for the value thereof. Otherwise, we must disregard entirely the surrounding circumstances and the persuasive effect of the insurance which had been actually procured at the time the letter above referred to was written.

But even more conclusive is the invoice or bill,

which specifically declares that the goods are "forwarded for your account *and risk*." The invoice or bill is also dated September 18th, 1867, and was prepared also after Sturm had procured the insurance in question. The goods were to be sold in Mexico for joint account, but until sold or returned, they were chargeable to him. They were to be shipped by him free of all charges and expenses on the part of the defendants. Consequently the goods were properly forwarded for his account. They were forwarded at his *risk* because the oral agreement had so provided, and the shipment was, in fact and in truth, at his *risk*. This statement of the invoice was consistent with the acts of both parties for (1) he had agreed to become absolutely responsible for the return of the goods or liable for their value in case of loss; (2) he had taken out insurance against the perils of the seas upon the theory and representation that he was liable to the defendants in case of loss; (3) they had refrained from taking out any insurance because the legal title to the goods was in Sturm, and he was absolutely responsible for their return or liable for their loss.

A.

The legal effect of the agreement to return the consigned goods free of all charges and ex-

penses to the defendants was to make him liable as purchaser in case of failure to return. Such was the practical interpretation acted on by the parties, sworn to by Mr. Sturm in the insurance litigation, acquiesced in for at least nine years. The contract, therefore, as so interpreted and acted upon, was not a bailment, but a conditional sale, with the option to return if not sold.

In *Moss* v. *Sweet*, 16 A. & E., N. S. 493, 494, certain goods had been delivered to the defendants "on sale or return." COLERIDGE, J., said:

> "The goods in question passed on condition that, unless returned, that is, at the option of the buyer, within a reasonable time, they were to be taken as sold to him. That condition was at an end after the lapse of a reasonable time without a return of the goods; and the sale was then complete. *The same consequence would follow where goods are destroyed or injured so that a return within the meaning of the contract becomes impossible.* Our judgment is consistent both with principle and with the authorities, except *Iley* v. *Frankenstein*, 8 Scott's New R., 839, which has probably been misunderstood."

In *Martineau* v. *Kitching*, L. R. 7 Q. B., 436, 455, BLACKBURN, J.; said:

> "If the parties have stipulated that, if after the two months the goods remain in the sellers' warehouse, they shall, nevertheless, remain there at the buyer's risk, it would be a manifest absurdity to say that he is not to pay for them; and I think the case of *Castle* v. *Playford* (Law Rep. 7 Ex., 98) is a clear authority of the Court of Exchequer Chamber,

that where the parties have stipulated that the risk shall be on one side, it matters not whether the property had passed or not, The parties here have by their express stipulation impliedly said, after the two months the goods shall be at the risk of the buyer, consequently it is the buyer who must bear the loss."

LUSH, J., p. 459, said:

"But I agree that the question is not in whom the property was, but at whose risk the goods were, and I collect clearly from the terms of the contract that it was agreed between the parties that after the expiration of two months the goods were to be at the risk of the buyer. * * * Therefore, the buyer was to pay for the goods an estimated approximate amount at the expiration of one month, then the goods were to be at the sellers' risk if the buyer chose to let them remain in the warehouse for a month longer; and the necessary implication from that is, that at the expiration of the two months they were to be at the risk of the buyer. That appears to me as plain as if those words had been expressed in the contract. Therefore, without saying in whom the property was vested, it seems to me to be clearly agreed between the parties that after the expiration of the two months the goods, if they remained in the plaintiffs' warehouse, were to remain at the risk of the defendant. The fire happened after the expiration of the two months, and therefore the defendant, the buyer, must be the loser."

QUAIN, J., p. 461, said:

"I think it is admitted even by Mr. Brown in his argument that the question of whether the property passed becomes immaterial, if you satisfy yourself upon the face of this contract that the parties had agreed that the risk should be in the buyer after the expiration of the two months. Now, seeing the

express stipulation that the sellers should incur the risk during the first two months, and looking at the nature of the contract, and the practice between the parties, I can come to no other conclusion than that the agreement between them was that after the two months the risk should be in the buyer and not in the sellers; and as the fire happened after the two months, I think upon that short ground the plaintiffs are entitled to recover."

In *Schlesinger* vs. *Stratton*, 9 R. I., 578, 581, DURFEE, J., said:

"The contract in this case belongs to a class of contracts often called 'contracts of sale or return,' being upon a condition that the buyer may return the goods within a fixed or reasonable time at his option. It has been held that goods so sold pass to the purchaser, subject to the option in him to return them, and that if he fails to exercise the option within the proper time the price of the goods may be recovered as upon an absolute sale. Moss *vs.* Sweet, 3 Eng. L. & E., 311; S. C., 16 Q. B., 493; Bianchi *vs.* Nash, 1 M. & W., 545; Beverly *vs.* The Lincoln Gas Light & Coke Co., 6 A. & E., 829. In Moss *vs.* Sweet, Wightman, J., said: 'The current of authorities has established that this contract means that the goods are sold absolutely, unless the buyer returns them within a reasonable time.' In that case no time for the return was fixed."

21 Am. & Eng. Encyclopedia, 647.

B.

If it be insisted that the title did not pass to the vendee, the intention that the risk should be assumed by him will nevertheless prevail and be given full effect.

In *Fragano* vs. *Long*, 4 Barn. & Cress., 219, 222, 223, the question litigated was whether or not the plaintiff Fragano was entitled to sue the carrier for damage to certain goods shipped to him, payable three months from the time of arrival. It was contended, on the part of the carrier, that the plaintiff would not be called upon to pay for the goods until their arrival at destination, and that, therefore, they were not at his risk. Insurance had been effected by the vendors, and the interest declared to be in Fragano. This was held to be practically decisive to establish that the shipment was at the risk of the plaintiff. BAYLEY, J., said:

> "It has been urged, that the form of the order throws the risk upon the vendor until the arrival of the goods, for they were not to be paid for until three months from that period, and consequently that the arrival was a condition precedent to Mason's right to sue for the price. If, however, the goods were not to be paid for unless they arrived, why should the plaintiff insure them? That shows that the arrival was not considered as a condition precedent to the payment. If the goods arrived, three months from the arrival was to be the period of credit; if they did not arrive, still the plaintiff would be bound to pay in a reasonable time after the arrival became impossible. If this were not so, the insurance would be altogether nugatory, for Fragano could not sue upon it, neither could Mason, the interest being declared to be in Fragano."

In the same case HOLROYD, J., said :

> "If was next contended that Fragano was not liable to the vendor unless the goods arrived; but the order for insurance is decisive as to that. The policy was to protect Fragano and shews that he considered he should be the sufferer if the goods were lost on the voyage, which he could not have been had the arrival of the goods been a condition precedent to his liability to the vendors."

In *Castle* vs. *Playford*, L. R. 7 Ex., 98, 99, 100, COCKBURN, C. J., and BLACKBURN, J., recognize that even if the property or title in goods shipped might not pass, nevertheless the consignee might be liable for all the risks of transit, and that it was immaterial in whom the property was. (See also remarks Blackburn, J., in *Martineau* vs. *Kitching*, L. R. 7 Q. B., 447, 455.) After pointing out that there was strong evidence of the intention of the parties that the property in the cargo, with all its risks, should pass, COCKBURN, C. J., said :

> "If that is not the construction of the contract, I think the true one is this: 'If you, the sellers, will undertake to ship me a cargo of ice, and to forward it by a given vessel to London, and hand me the bill of lading, so that I may have the control over the cargo, and the distribution of it, I will engage, when it arrives, to pay you according to what may be its value; and if, in the meantime, while it is upon the seas, it shall perish through the perils of the seas, I will undertake to pay you for it according to what may be estimated to have been its fair value at the time of going down.' That I take to

be the construction of the contract, and I do not think it was intended to make the stipulation that the cargo should be at the risk of the purchaser contingent upon the fact of the goods arriving or not in this country, which is the proposition contended for on the part of the defendant. * * * It is enough that the contract is such as would be consistent with the second construction, namely, that the defendant undertook that if the cargo should be shipped and the bills of lading transferred to him, he would pay for it according to a certain rate; and if it perished, he would pay for it according to what might be a fair estimation of its value at the time it went down."

And BLACKBURN, J., p. 100, said:

"My impression is, if it were necessary to decide it now, that the effect of this contract is that the property passed; but I think it is unnecessary to decide the matter. The parties in this case have agreed, whether the property passed or not, that the purchaser should, from the time he received the bills of lading, take upon himself all risks and dangers of the seas; and, according to Mr. Littler's construction, I do not see what risk he took upon himself at all, unless it was this—that he said, 'If the property perishes by the dangers of the seas, I shall take the risk of having lost the property, whether it be mine or not.'"

In *Stock* vs. *Inglis*, L. R., 12 Q. B. D., 564 571, 574, 576, the Court considered at length a similar question, and held that the circumstances of a shipment may have the effect of passing, the risk, though not the title or property in the

goods, to the purchaser or consignee. LINDLEY, L. J., said :

> "It is plain that that was their course of business, and that the plaintiff was aware of it, to this extent at all events, that having had dealings with them for years, he had been in the habit of insuring what he bought the moment it was shipped. That is plain. * * * It is said, however, that you cannot have a contract by which the goods are to be at the risk of the buyer, that is, that the buyer is to pay for the goods shipped, lost or not lost, unless those goods were appropriated to him when they were shipped. That seems to me too wide a proposition. * * * Agreeing with Field, J., that there was no appropriotion of goods so as to pass the property from Drake & Co. to the plaintiff, it appears to me that it was the intention of the parties that the 200 tons, part of this cargo, should be at the risk of the plaintiff. If that is once conceded, there is no further difficulty in the case, because no authority was cited, nor could be, that a man who is liable to pay for goods has not got an insurable interest in them. *Anderson* v. *Morrice* (Law Rep. 10 C. P., 609; 1 App. Cas., 713) is not an authority against the proposition that a person has an insurable interest in goods if he is liable to pay for them, whether he has the property in them or not."

C.

The appellant's counsel may urge that the conduct of the parties, until the present litigation, proceeded upon an erroneous construction and misconception of the complainant's legal rights, and that the complainant acted honestly but mis-

takenly in the insurance litigation. In view of his own testimony in this case, such a claim is preposterous. But, even if there had been no fraud, and the meaning of the original understanding was doubtful the Court would not set aside the practical interpretation of the parties themselves at the time of the shipment and during the following nine years. If we add to this practical construction, the proceedings, testimony and arguments in the insurance litigation, the conclusion must be irresistible that the invoice recited truly what had been understood and agreed, namely, that the goods were to be shipped at the risk of Sturm.

In *Chicago* vs. *Sheldon*, 9 Wall., 50, 54, Mr. Justice NELSON said:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the Court as the true one."

In *District of Columbia* vs. *Gallaher*, 124 U. S., 505, 510, Mr. Justice MATTHEWS said:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

In *Knox County* vs. *Ninth National Bank*, 147 U. S., 91, 99, Mr. Justice BREWER said:

> "It is a familiar rule that the interpretation given to a contract by the parties themselves is competent, and oftentimes very weighty, evidence in determining its meaning and force. So, in a matter of this kind, the whole conduct of the county, both before, at the time, and after the issue of the bonds, may be shown to aid in determining under what statute and by what authority the county proceeded in the issue of these bonds. Chicago *vs.* Sheldon, 9 Wall., 50, 54; Steinbach *vs.* Steward, 11 Wall., 566, 576; Canal Company *vs.* Hill, 15 Wall., 94; Merriam *vs.* United States, 107 U. S., 437; United States *vs.* Gibbons, 109 U. S., 200.

See also

Topliff vs. *Topliff*, 122 U. S., 121, 131.

D.

Upon this question of the practical construction of the parties themselves, the appellant urges the suggestion of the District Judge (Record, p. 112) that the defendants had op-

posed a settlement in May, 1871, which would have paid them in full, leaving a surplus of $37,248 for Sturm (appellant's brief, p. 45). There were twelve insurance companies originally interested and four had paid prior to May, 1871, leaving five New York companies and three Baltimore companies to recover from. There is no proof that Mr. Choate represented the Baltimore companies, or that any offer of fifty per cent. was made on behalf of all the New York companies. But, if the eight insurance companies had made such an offer, it will be instructive to see how far the facts support the appellant's claim as stated in the printed brief, viz.:

> "Assuming the position now maintained by Herman Boker & Co. to be correct, that Sturm is, and was, their debtor for the amount of the consigned goods, at gold price, and that Sturm was chargeable with the entire expenses of the collection, a settlement on the basis of Choate's proposition of 50 cents on the dollar, would have paid the defendants in full and left a surplus out of the collection for Sturm of $37,248. Their interest, therefore, would have prompted a desire for a compromise at 50 cents, or any figure that would have paid them their claim."

There were policies for $133,000 in New York Marine Insurance Companies and $30,000 in Baltimore Companies. At the time this alleged offer of compromise was made, May, 1871, four of the policies, amounting in the aggregate to

$40,500, had been collected. This left still pending and undetermined claims upon $92,500 of New York policies and $30,000 of Baltimore policies. If Mr. Choate's offer was fifty per cent. of the New York policies, it would have made a total of $46,250. If he included the Baltimore policies, the total would have been $61,250. *The defendants, however, at this time only held an assignment of two of the policies on the "Keese," namely, the Orient for $15,000 and the New York Mutual for $12,500* (Bill, pp. 4, 6), and fifty per cent. of the policies then held by them would have been $13,750. The remaining policies were still in Sturm's name and under his control.

In May, 1871, Sturm's indebtedness to the defendants, according to their position *then and now*, namely, that they held the policies as collateral security, was as follows:

	DEBIT.	
Invoice of Sept 18. 1867 (gold)...	$39,887.60	
Premium on gold, 45 per cent ...	17,949.42	
		$57,837.02
Invoice of October 24, 1867 (Str. "Wilmington")		10,375.00
Interest on above amounts to May 15, 1871..		17,406.24
Balance of bank account as of May 15, 1871.		8,865.37
Total debits.		$94,483.63

CREDIT.

Amount collected from Sun Mutual Ins. Co. (June 11, 1870).....	$11,686.25	
Interest on same to May 15, 1871.	756.69	
Amount collected from Mercantile Ins. Co. (July 12, 1870).....	$15,768.78	
Interest on same to May 15, 1871	929.00	
Total credits.....		$29,240.72

The result would be that on May 15, 1871, the complainant was indebted, to the defendants, in the sum of $65,342.91, made up as follows:

Total debits as above.....	$94,483.63
Total credits as above.....	29,140.72
Balance due defendants on May 15, 1871..	$65,342.91

It is, therefore, demonstrated that the defendants would not have been paid in full under the alleged offer of settlement in any aspect whatever. They did not then have control as collateral security of all the policies. Looking only to the two policies which they held, the deficiency under the compromise would have been $51,592.91 *against* Sturm. If they had then controlled all the policies, and the proposed compromise was on the five New York policies, the deficiency would have been $19,092.91 in their favor *against* Sturm, and if the Baltimore policies be included, there would nevertheless have been a deficiency of $4,092.91 *against*

Sturm. It must therefore seem absurd to argue in this Court that the proposed compromise on the defendants' theory would have paid defendants in full and have left a surplus to the complainant of $37,248.

E.

There can be no doubt that in order to recover in the insurance cases, Sturm's counsel contended, on his behalf, that he was liable to the defendants for the loss of the consigned goods.

The litigation began in 1868, and lasted nearly nine years. During all this time, Sturm and his counsel, in all the proceedings, claimed that his insurable interest was grounded upon his liability for the invoice value in gold of the consigned goods. The original proofs of loss and subsequent pleadings establish this. The recovery was sustained upon this theory. Thus VAN VORST, J., in affirming at General Term the recovery of Sturm against one of the insurance companies, said (Sturm *vs.* Atlantic Mutual Ins. Co., 38 N. Y. Super. Ct., 281, 301):

> "Plaintiff was to bear these expenses, and was to sell the property in Mexico, at the best possible advantage, but not below the '*invoice price*,' unless specially directed by Boker & Co., in which case they were to bear the loss. The profits arising from the sale, if any, were to be equally divided between Boker & Co. and the plaintiff. In case

these goods were not sold, plaintiff was to return the same to Boker & Co., free of all charges to them, or pay for the same the '*invoice price*' thereof. The invoice value of this portion of the cargo was claimed by plaintiff to be fifty-two thousand eight hundred and forty-eight dollars; which invoice value is sustained by the affidavit of Herman Funke, one of the firm of Boker & Co., in evidence, who states such sum was the 'invoice value of the same,' and which value was adopted in effecting the insurance. Under the obligations of the plaintiff to Boker & Co., he was certainly entitled to the possession, and had the right to dispose of these goods. IN CASE OF A FAILURE TO SELL THEM FOR THE INVOICE PRICE, HE WAS BOUND TO RETURN THEM, AND WAS LIABLE FOR THEIR LOSS."

The insurance company appealed to the Court of Appeals, and the judgment was affirmed (63 N. Y., 77, 80). FOLGER, J., writing the opinion of the Court, said:

"He either owned it, or he had a trust to discharge as to it, and was, in some measure, liable for its safety, and he had the possession, or the right of possession; and this creates an insurable interest."

Mr. Parsons argued the case in the Court of Appeals on Sturm's behalf, and said, in the brief filed in September, 1875, now in the New York State Library at Albany (printed brief, p. 9):

"What the defendants probably meant by this branch of the motion to non-suit, was, that the plaintiff could not recover, in respect of the consigned goods. THOSE GOODS WERE CONSIGNED UNDER AN ARRANGEMENT WHICH MADE THE PLAIN-

TIFF RESPONSIBLE FOR THEIR LOSS; AND THAT LIABILITY GAVE HIM AN INSURABLE INTEREST."

This argument was made in September, 1875, seven years after the commencement of the litigation, and four years after Mr. Parsons had written to his client (p. 589):

"I REMEMBER, HOWEVER, THAT YOU DID AT ONE TIME TELL ME THAT THEY HAD THE LEGAL RIGHT TO TREAT YOU AS OWING THEM THE FULL PRICE OF THE CONSIGNED GOODS."

Yet, it is now urged that Sturm was never liable or responsible for the loss of the consigned goods.

F.

The bill did not seek to surcharge or falsify the accounts rendered by the defendants. There had been, as to some of the items in controversy, a complete settlement on the 21st of May, 1869, when Sturm paid the defendants $969.12 to balance his account, thus admitting the correctness of all the charges for expenses in the insurance litigation theretofore made against him (Record, p. 72). Subsequently, from time to time, he was fully advised of all the charges that were made against him, and on or about the 23d day of June, 1876, the pass book of the defendants was surrendered to him, with the vouchers and checks, showing the accounts as

written up to the 21st day of June, 1876, including all items of debit and credit. To a few of these items he objected, and some errors were corrected; but to all those involved in this controversy no objection was made until long afterwards. The bill could have been dismissed below upon the ground that the settlement of the 23d of June, 1876 (Record, p. 60), constituted an account stated.

Wiggins vs. *Burkham*, 10 Wall., 129, 131;

Oil Company vs. *Van Etten*, 107 U. S., 325, 334.

III.

THE CIRCUIT COURT PROPERLY HELD THAT THE BILL OF COMPLAINT WAS BASED UPON AN AGREEMENT ALLEGED TO HAVE BEEN MADE AFTER THE CONTRACT OF CONSIGNMENT.

Reference to the bill of complaint (pp. 5–6) will show, beyond question, that the claim for expenses and for services rendered is alleged to be based upon an express oral agreement entered into on the 21st and 27th of March, 1868. The principal, if not practically the only, controversy below was as to this oral agreement. The issue tendered, and which the defendants in

coming into Court prepared to meet, was this oral agreement as alleged in the bill of complaint. The complainant should not be permitted to change front and to claim upon an implied obligation, after averring an express contract covering the same subject matter. The issue between the parties thus tendered was not that of an implied obligation springing from the original contract of consignment, but, to repeat, an express oral contract to share in the expenses and to pay him for services rendered. The fundamental rule of equity pleading and practice requires relief to be awarded *secundum allegata et probata*, and does not permit a complainant to insist upon relief because the facts, as proved, entitle him to advance some other claim than that alleged in the bill.

In *Simms* vs. *Guthrie*, 9 Cranch, 19, 25, Chief Justice MARSHALL said:

> "It is certainly a correct principle that the Court cannot decree to any plaintiff, whatever he may prove, more than he claims in his bill. Nothing further is in issue between the parties."

In *Carneal* vs. *Banks*, 10 Wheat., 181, 189, Mr. Justice MARSHALL said:

> "The maxim, that a decree must be sustained by the allegations of the parties, as well as by the proofs in the cause, is too well established to be disregarded."

In *Foster* vs. *Goddard*, 1 Black, 506, 518, Mr. Justice SWAYNE said:

> "In equity proceedings the proofs and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved. 9 Cranch, 19, Simms *vs.* Guthrie *et al.*; 9 Pet., 483, Harrison *vs.* Nixon; 10 *Id.*, 178, Boone *vs.* Chiles; 3 Barb.'s C. R., 613, Trip *vs.* Vincent *et al.*; 3 Ohio R., 61, Bank United States *vs.* Shultz; 5 Dana, 552, Sadler *vs.* Grover; 1 J. J. Marsh, 237, Breckenridge *vs.* Ormsby."

Harrison vs. *Nixon*, 9 Pet., 483, 512;
Boone vs. *Chiles*, 10 Pet., 177, 209;
Agawam Co. vs. *Jordan*, 7 Wall., 583, 607;
Rubber Co. vs. *Goodyear*, 9 Wall., 788, 793;

1.

If we disregard the oral agreeements of March 20 and 27, 1868. and accept the complainant's present claim that he is suing under the original contract of consignment, it is difficult to see on what legal theory he seeks to recover. The appellant's brief does not argue this point. According to his present pretense, he held policies amounting in the aggregate to $123,000; the defendants held policies for $40,000, but the interests were separate and distinct. The payments for expenses were primarily for his own benefit, as also were his services. The

law regards him as a volunteer so far as the defendants acquired any benefit individually from the services he rendered and the expenses he defrayed in the insurance litigation. Had they had no interest in the litigation, he would have rendered exactly the same services and have incurred the same expenses. The relations of the parties created no implied obligation to share in the expenses or to pay him for his services. There was nothing proved in the suit to take the case out of the well-established rule as to voluntary payments and voluntary services.

This rule as to volunteers is tersely stated by BOWEN, L. J., in *Falcke* vs. *Scottish Imperial Ins. Co.*, L. R., 34 Ch. Div., 234, 248, viz :

> "The general principle is, beyond all question, that work and labor done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

See also,

Converse vs. *Ferre*, 11 Mass., 325, 326 (cited with approval by POLLOCK, C. B., in *Leigh* vs. *Dickeson*, 12 Q. B. D., 198).

Boulton vs. *Jones*, 2 H. & N., 564, 565 ;

Homestead Company vs. *Valley Railroad*, 17 Wall., 153, 167;
Boston Ice Co. vs. *Potter*, 123 Mass., 28, 30;
Bartholomew vs. *Jackson*, 20 Johnson (N. Y.), 28.

Even if the interests were joint, the law as to volunteers would be equally applicable.

Leigh vs. Dickeson, L. R., 15 Q. B. D., 60, 65, 67, 68.
Denver vs. *Roane*, 99 U. S., 355, 358.

2.

The oral contract for expenses and services was made in New York and was to be there performed. As alleged, it provided for rendition of services and sharing in expenses during a litigation, as long as it should last, which both parties knew would be protracted. As matter of fact the litigation lasted nine years, and this suit upon the oral agreement was brought over twelve years after it was entered into. The spirit of the statute of frauds is to require agreements to be reduced to writing in order to avoid frauds, and to have important obligations rest upon some more reliable foundation than the slippery or treacherous memory of interested parties. In this case the

claim is as follows, to copy from Exhibit "A" to the bill of complaint (Record, p. 11):

"HERMAN STURM in joint account with
HERMAN BOKER & CO.

1882.		Cr.
" Jan'y 1, '77.	By expenses paid for joint insurance suits, as detailed statement annexed	$113,698.63
" Jan'y 1, '82.	By interest at 7 per cent. to date.....	123,087.46
	By services and labor involved about the insurance litigation for March 7, '68, to July 7, '76, 8 years and 4 months, at $6,000 per annum.....	50,000.00
	Interest to January 1, 1882, at 7 per cent....	21,763.80
		$308.549.89"

It is pretended that all these disbursements were made and eight years of services rendered upon an oral agreement made in March, 1867. It would be just and proper, in view of the positive denials of all the defendants, to adjudge that Sturm should have reduced the agreement to writing, and not having done so it was not enforcible under the New York Statute of Frauds, which declares *void* "every agreement that by its terms is not to be performed within one year from the making thereof." (2 R. S., 135, § 2.)

Warner vs. *Texas & Pacific Ry. Co.*, 54 Fed. Rep. (Circuit Ct. of

Appeals), 922, 924 ;

Day vs. *N. Y. Central R.R. Co.*, 31 Barb., 548, 555 ;

Hinckley vs. *Southgate*, 11 Vermont, 428, 430 ;

Swift vs. *Swift*, 46 Cal., 266, 269 ;

Boydell vs. *Drummond*, 11 East, 142, 155.

Davies vs. *Appleton*, 25 Upper Canada, C. P., 376, 384.

Eley vs. *The Positive, etc., Co., Ltd.* (1875), L. R., 1 Ex. D., 20, 30.

The point as to the Statute of Frauds was not specifically taken in the answer; but it was sufficiently presented under the explicit denial of ever having made any such contract. The defendants deny that they ever entered into the alleged agreement to pay a *pro rata* share of the disbursements. They were not called upon to allege, inconsistently, that if they had made the agreement which they were denying under oath, it was nevertheless void under the Statute of Frauds.

IV.

AS TO THE FORGERIES COMMITTED BY COMPLAINANT AND THE EFFECT THEREOF UPON HIS CLAIM FOR RELIEF IN EQUITY.

The fourth specification of errors is that the Circuit Judge erred in ruling that the fact of forgery of itself precluded any relief to the complainant in equity, and the appellant's counsel suggest in their brief (p. 106) that no argument in support of this proposition will be made in this Court.

The opinion of the Circuit Judge is printed in the record (pp. 95, 108, 116), and the perusal thereof will show that he did not rule that the fact of forgery of itself would preclude recovery. What the Circuit Judge obviously meant was, that a complainant did not come into court with clean hands who had previously perjured himself wilfully and deliberately in reference to the same subject matter, who had falsely alleged facts in his bill of complaint, who had manufactured forged documents in order to sustain the claim upon which his bill was to be based, and who had committed perjury in the suit in order to support these forgeries and false allegations.

The District Judge agreed with the Circuit Judge that the conveyance of the real estate at Indianapolis was in fact and law a mortgage,

and he thus concurred in the view of the Circuit Judge that the complainant had committed deliberate perjury in his bill and testimony upon this question. It was also claimed and proved by the defendants that the complainant had perjured himself in a number of other instances, and that many of his exhibits were forgeries, particularly exhibits H and F. As to these latter exhibits, Judge GRESHAM said (p. 116):

> "Further, I find that the exhibits were fabricated, and the District Judge and myself do not disagree up to a certain point in that connection—that is to say, he agrees that if the simple issues were submitted to us on the evidence in the record—were F and H fabricated or were they genuine—then he would think they were fabricated, but taken in connection with the other evidence he cannot say so. That is his position in substance."

After reviewing the testimony, the District Judge proceeded to make the following statement, viz. (p. 114):

> "Now, one word as to clean hands. I do not think that doctrine applies strictly to the production of the false evidence in a case if the rights of a party are clearly established otherwise. A man must have clean hands in respect to his original cause of action. The cause of action must not have originated in corruption; it must not be founded upon corruption; but if once you say that equity will not administer between parties who try to produce a false impression in the evidence you lift equity above the plane of practical usefulness in the affairs of men. If I conceded that General Sturm forged these papers I would simply

> say it was the case of a man making Greek fire with which to fight his more desperate and despicable foe. It does not affect his rights on the original cause of action, because that stands clear and well established independently of all disputed or, at least, of all fairly questionable memoranda, documents, or conduct."

The doctrine advanced by the appellant, which thus received some approval in the dissenting opinion below, seems to be that a complainant in a court of equity—a court of conscience—may deliberately deceive and impose upon the Court by forgery and wilful perjury, without any risk whatever to his right to equitable relief, provided a cause of action is otherwise sufficiently established. In other words, the proposition is, that such a complainant, perjurer and forger though he be, may nevertheless insist on relief, because, forsooth, some portion of his testimony, or some part of his case, has not been successfully impeached.

It is true that no precedent has been found where a bill in equity was dismissed solely upon the ground of the complainant's perjury or forgery; but it has yet to be enunciated as a rule of equity practice that such a complainant is entitled to any relief or consideration.

It has always been the fundamental doctrine of jurisprudence that conscience and good faith shall be requisite to call into action the powers of

a court of equity. As LORD ROMILLY, M. R., said in *Cocks* vs. *Chandler*, L. R. 11 Eq., 446, 449:

> "It is essential, when persons in trade come into this Court, that they should remember that the administration of equity is founded on perfect truth."

Courts of equity are constantly seeking to shape their rules and to mould their remedies upon principles of right, justice and morality, so far as such principles can become the elements of positive human jurisprudence. Conscience and good faith have always been exacted and pre-eminently so towards the Court. The idea that a complainant may with impunity impose upon and deceive the Court by perjury or forgery would prostitute the administration of justice and be utterly subversive of all notions of honest or decent practice. If the appellant's suggestion be sound and find support in this Court, practice in equity, instead of being a fair struggle after the truth, will speedily degenerate into a rivalry of deceit, forgery and perjury.

The maxim that he who comes into equity must come with clean hands, sprang from the doctrine that he that hath committed iniquity shall not have equity. The principle of clean hands should apply as well to the acts of the party in Court as to those before he came into equity. It can-

not be that dishonest and corrupt acts bar relief if done before suit, but do not affect the right to relief if done after you are once in a court of equity. Do the rules requiring conscience and good faith and clean hands cease to regulate the conduct of litigants as soon as they have passed the threshold of a court of equity? It is confidently submitted that this Court will declare, as a warning to dishonest litigants, that a court of equity will never lend its aid nor grant relief to a complainant who seeks to deceive and impose upon the Court.

1.

A number of the instances of forging and fabrication of documents were undoubtedly committed prior to the commencement of this suit, and the doctrine of clean hands, therefore, must apply. The complainant came into Court prepared to submit these forgeries, and this being proved, he is clearly brought within the rule, even if we accept the appellant's idea that the maxim in question applies only to what is done *before* the commencement of a suit in equity.

2.

There is, however, a penalty for forgery or perjury, which the appellant's counsel do not re-

fer to, and that is the rule of evidence "*Falsus in uno, falsus in omnibus.*"

The complainant's evidence having been clearly false upon a number of the issues, the Court below was correct in discrediting and rejecting his whole testimony, his forgeries and his documentary evidence.

The complainant's case mainly rested upon his own evidence, corroborated or supported by diary entries and disputed letters (p. 102), and part thereof was rejected by both judges as false. Under such circumstances, a court of justice always applies the maxim: "*Falsus in uno, falsus in omnibus.*" If Sturm's own testimony be rejected, the case framed by the bill remains unproved, for without his testimony and his documents there is not sufficient evidence to establish his claims to an accounting.

In the case of "*Santissima Trinidad,*" 7 Wheat., 283, 339, Mr. Justice STORY used the following language:

> "But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and Courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim "*falsus in uno, falsus in omnibus.*" What

ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?"

In the case of the "*St. Nicholas*," 1 Wheat., 417, 430, Mr. Justice JOHNSON had said:

"This leads us to the consideration of the affidavits. And here it is, with extreme regret, that we are called upon to declare that we can attach no credence to them. Inerarity has forfeited his claim to the respect of this Court by taking an oath to a fact which might, indeed, by possibility, have been true, but which he could not have known to be true. He has sworn that this parcel of cotton, so clearly proved to have been purchased at New Orleans, was of Spanish origin. This is a part of the machinery, an authenticating document, and its foulness communicates a taint to the residue."

In *Stoffer* vs. *The State*, 15 Ohio St., 47, 54, RANNEY, J., said:

"An ancient maxim of the law of evidence—*falsus in uno, falsus in omnibus*—would seem to import such exclusion, by raising a presumption of law, *juris et de jure*, that a witness who is clearly shown to have committed perjury, upon one material point in the case, should be deemed wholly unworthy of credit upon any other, and his testimony be absolutely rejected. * * *

Among the elementary writers upon evidence, whose works have been examined by us, *Mr. Starkie* alone has stated the solid reasons upon which the maxim rests, and the case to which, alone, it can be applied. He says: 'As the credit due to a witness is founded, in the first instance, on general experience of human veracity, it follows

that a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, *falsus in uno, falsus in omnibus.* The presumption that the witness will declare the truth, ceases as soon as it manifestly appears that he is capable of perjury. *Faith in a witness' testimony cannot be partial or fractional;* where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and, according to the result, his testimony is to be credited or *rejected.*' * * *

At best, it is left entirely uncertain whether he has uttered truth or falsehood; and it is not consistent with that moral certainty of the existence of facts which the law requires before men are affected in their lives, liberty or property, to act upon what may be true or false or to use such corrupt and deceptive instrumentalities in the pursuit of truth. * * *

In a word, the temptations and opportunities for deception in judicial inquiries are far greater than in the ordinary transactions of life; the tribunals must act promptly and decisively upon all the great interests which men hold valuable; and neither the rights of individuals, nor the moral effect of their determinations, can fail to suffer when they proceed on evidence which is quite as likely to be deceptive as otherwise, and their findings as likely to be founded in error as in truth."

In *Deering* vs. *Metcalfe*, 74 N. Y., 501, 507, FOLGER, J., said:

"If a jury clearly see that a witness, in a case on trial before them, has, in that case or in a prior one, sworn corruptly false, they can but be satisfied of his utter unreliability, and they ought to disregard all the testimony given by him to them."

In *Moett* vs. *People*, 85 N. Y., 373, 378, EARL, J., said:

> "The Latin maxim [*falsus in uno, falsus in omnibus*] is unquestionably founded upon common sense and sound philosophy. It is laid down as a maxim by all the text writers upon evidence, and in many reported cases. That the maxim is a sound one for the guidance of juries no one can doubt."

See also

Rubber Co. vs. *Goodyear*, 9 Wall., 788;

Giltner vs. *Gorham*, 4 McLean, 402, 424;

Am. Bell Tel. Co. vs. *People's Tel. Co.* (Drawbaugh Case), 22 Fed. Rep., 309, 324, 325;

Tracey vs. *Town of Phelps*, 22 Fed. Rep., 634, 635;

3.

The verified bill of complaint called for a full and complete answer to every matter therein averred. The complainant did not waive the answer under oath of the defendants. Thereupon, the defendants filed their joint and several answer, verified by the affidavits of the defendants Funke and Schumacher, The answer was responsive to the bill, and positively denied under oath the various claims and allegations therein averred. It was, therefore, necessary for the complainant to overcome the inflexible rule that where the

answer is responsive to a bill and denies the facts alleged unequivocally and under oath, the denials must be overcome by the *satisfactory* testimony of two witnesses, or of one witness corroborated by circumstances which are *equivalent in weight to another witness.* The complainant sought to prove his cause of action mainly by his own evidence. It will be claimed that some portions of his testimony are corroborated by documentary evidence, and particularly by the diary entries, &c. It must be a sufficient answer to say that if his testimony was necessary to prove these documents, the Court below could properly have dismissed the bill on the ground of failure of proof for want of corroborating circumstances required by the rule. As Judge GRESHAM put it (p. 102):

> "I might review the case further, but it is sufficient to say that Gen. Sturm is in a Court of Equity, a court of conscience, asking relief, and that on previous occasions he swore differently from what he swears here. His statement in connection with the deed just alluded to he knew was not correct, and I am forced to believe that he fabricated Exhibits F and H. He is contradicted by H. B. & Co., and others. He is obliged to maintain his case by a preponderance of the evidence, which he has not done. Much of his case depends upon his own evidence. I do not think a Court believing that he has been thus discredited could be expected to enter a decree in his favor mainly on his own evidence. I think the bill ought to be dismissed."

In *Vigel* vs. *Hopp*, 104 U. S., 441, 442, Mr. Chief Justice WAITE said:

> "The answer denies every allegation of fraud and trust, and insists that the deed was intended as an absolute conveyance, and not as security. This is responsive to the bill, and before the relief can be granted which is asked, these denials must be overcome by the satisfactory testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to another. 2 Story, Eq., sect. 1528. The appellee is the only witness in support of the bill, and the corroborating circumstances are not, in our opinion, sufficient to overcome the answer. It will serve no useful purpose to enter into analysis of the testimony."

In *Morrison* vs. *Durr*, 122 U. S., 518, Mr. Chief-Justice WAITE, said:

> "The bill called for answers under oath, and McDermott answered accordingly, denying each and all of the allegations of fraud which were made against him. This being responsive to the bill, his denials must be overcome by the satisfactory evidence of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to another, before the complainants can be granted the relief they ask. No such proof has been made. We have looked carefully through the whole evidence, and, while it is full of circumstances calculated to excite suspicion, there is not enough to justify us in reversing the decree of the Court below dismissing the bill. The questions involved are principally of fact, which it would serve no useful purpose to consider at length in an opinion."

In *Southern Development Co.* vs. *Silva*, 125 U. S., 247, 249, Mr. Justice LAMAR said:

> "The answer of the defendant is direct, positive, and unequivocal in its denials of the allegations of the bill, and, as an answer on oath is not waived, unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, the complainant will not be entitled to a decree; and this effect of the defendant's answer is not weakened by the fact that the equity of the complainant's bill is the allegation of fraud. Vigel *vs.* Hopp, 104 U. S., 441; Story Eq. Jur., § 1528; Daniell Ch. Pr., 844."

See also:

Clark's Exr's. vs. *Van Riemsdyk*, 9 Cranch, 153, 160;

Carpenter vs. *Providence Washington Ins. Co.*, 4 How., 185, 217;

Godden vs. *Kimmell*, 99 U. S., 201, 206;

Monroe Cattle Co. vs. *Becker*, 147 U. S., 47, 54.

4.

The complainant sought to corroborate his own testimony by introducing certain documents, which, even if genuine, were incompetent as evidence for any purpose. Thus, although professing to have remembered the minutest detail of all transactions, the complainant attempted to

corroborate himself by secret diary entries of pretended conversations with the defendants, many of which entries were shown to have been fictitious, and none of which were ever seen by the defendants. He then read in evidence a letter from his brother to himself, to which the District Judge attached controlling importance, because the genuineness of that letter was not successfully attacked. Of the letter, the defendants knew absolutely nothing at the time it was written (November 28, 1867; Record, pp. 2287, 2293), nor until it was produced upon the hearing over fifteen years afterwards. The complainant also read in evidence a number of letter-press copies of letters which were never received by the defendants, which they never acknowledged, and which are inconsistent with the genuine correspondence of the time.

The diary enteries were clearly not competent evidence to corroborate Sturm, or for any other purpose. It is to be carefully noted that Sturm seeks to offset the effect of Mr. Parsons' letter of May 29, 1871, and practically to impeach it by one of his diary entries (see Appellant's Brief, pp. 51 *et seq.*). Yet, Mr. Parsons was not called as a witness, although living, to corroborate this diary entry. It is one of the series of forgeries.

The entries in the diaries, even if genuine,

i. e., written at the time they purport to have been made, cannot, under any circumstances, be admitted as instruments of evidence. The claim is that these entries and the Fred. Sturm letter are to be received as evidence to corroborate Sturm, and accepted as sufficient to comply with the rule requiring two witnesses or one witness with corroborating circumstances to overcome or outweigh the sworn denials in the answer. It would open the door to gross frauds if men could thus manufacture evidence in support of claims which they intended in the future to bring forward against parties dealing with them. Sturm pretended to have a clear and distinct recollection of every essential fact and detail. There was, therefore, no necessity or excuse for receiving the diary entries in evidence.

Vicksburg & Meridian R.R. vs. *O'Brien*, 119 U. S., 99, 102;

Field vs. *Thompson*, 119 Mass., 151, 152;

Russell vs. *Hudson River R.R.*, 17 N. Y., 134, 140;

National Ulster Bank vs. *Madden*, 114 N. Y., 280, 284.

5.

The letter from Fred. Sturm to his brother, the complainant, was incompetent either in itself

or as corroboration of the latter's testimony. The letter does not purport to state anything within the personal knowledge of the writer, but hearsay only from Stocking. Fred. Sturm could not, of course, have testified to what Stocking had told him, and that is all that this letter attempts to set forth or all upon which Judge WOODS relies.

In *Freeborn* vs. *Smith*, 2 Wall., 160, 176, Mr. Justice GRIER said:

> "To rebut the plaintiff's proof, the defendants offered a correspondence between themselves, and some letters to them by one Eaton, their agent. It is hard to perceive on what grounds the parties should give their private conversations or correspondence with one another or their agent to establish their own case, or show that they had not held themselves out to the public as partners of the deceased."

In *Insurance Company* vs. *Guardiola*, 129 U. S., 642, 643, Mr. Justice GRAY said:

> "It is too clear for discussion, that these letters, written to the plaintiffs by their own agents, were no part of the transaction of shipping the sugar, but were mere reports by the agents to their principals, and were incompetent, either in themselves or in corroboration of the testimony of the agents, to prove the facts recited in the letters, against third persons. Freeborn *vs.* Smith, 2 Wall., 160, 176; Dwyer *vs.* Dunbar, 5 Wall., 318; United States *vs.* Corwin, ante. 381. * * * *
>
> "But the letters to the plaintiffs from their own agents were absolutely incompetent, and their

admission in evidence clearly tended to prejudice the defendant with the jury."

6.

The letter press copies letters, sworn never to have been received by the defendants, were likewise incompetent. It is true that proof of mailing creates a presumption that a letter has been received, but such presumption is one of fact and may be overcome and rebutted by proof that the letter was never received. Proper proof of mailing in most of the instances was wanting, and the *fact* of mailing depended for proof in nearly every case upon Sturm himself. Without satisfactory proof of mailing, the presumption of receipt could not, of course, exist.

Henderson vs. *Carbondale Coal & Coke Co.*, 140 U. S., 25, 37.

Conclusion.

The Court below properly dismissed the bill of complaint, and the decree should be affirmed.

Washington, October Term, 1893.

CLARENCE A. SEWARD,
WILLIAM D. GUTHRIE,
ALBERT BAKER,
Of Counsel for Appellees.

ABSTRACT OF PLEADINGS.

COMPLAINT.	ANSWER.
1.	1.
On the 18th of September, 1867, defendants consigned to complainant, to be shipped by him to Mexico and there sold, arms and munitions of war to the value of $39,887.60, according to the bill furnished on that date,	Admitted.
2.	2.
which amounts defendant represented to be the cost price.	Defendants deny that the prices in the invoice were represented to be the cost prices of the goods, and aver that said price was payable in gold, and was so stated to be payable on the invoice.
3.	3.
Said goods were consigned upon an agreement that he was to have them carried to Mexico free of expense to defendants, and there sold; if sold at a loss, defendants to bear the loss; if sold above invoice price, complainant to have an equal share of profits.	The goods were consigned under the contract, which was at first *parol* and afterwards reduced to writing in the form of two letters of dates September 18, 1867, and September 26, 1867, and an invoice, bearing date September 18, 1867. Said letters and invoice are set forth in defendant's answer. Such contract was subsequently modified so as to permit complainant to sell some of the goods for prices less than designated in the invoice, and to forbid him to sell the remainder of said goods for less than invoice prices. Said letters and invoice and modifications comprise the *only* contract relative to said goods.
4.	4.
Said goods were shipped on the "Keese" and the "Blonde," together with similar goods belonging to the complainant amounting to $169,516.	Admitted.

5.

The "Blonde" carried of the consigned goods..... $10,560.60
Of the complainant's. 17,250.00

$27,810.60

5.

Admitted.

6.

The "Keese" carried of the consigned goods..... $29,327.00
Of complainant's 152,266.00

$181,593.00

6.

Admitted.

7.

The "Keese" sailed on September 18, the "Blonde" on September 21, 1867.

7.

The "Keese" sailed on September 18, the "Blonde" on September 27, 1867.

8.

All the goods so shipped on both vessels, including those shipped on joint account, were insured in the name of the complainant.

8.

Admitted and averred, but defendants deny that the consigned goods were consigned to plaintiffs "on joint account," except as appears in said letters and invoice.

9.

The whole amount of insurance on the "Keese" was $163,000, in 12 policies.

9.

Admitted.

10.

The whole amount of insurance on the "Blonde" was $30,000, in two policies.

10.

Admitted.

11.

Before the vessel sailed defendants requested complainant to insure their interest to the amount of $40,000.

11.

Denied; and defendants aver that, by the terms of the contract, the complainant became the insurer of said goods, and was, by the terms of the contract, bound either to sell them in Mexico and account therefor to defendants according to the terms of the contract, or to return them to New York free of any expense to the defendants; and that, *recognizing such liability*, the complainant in-

sured all the goods, including both the consigned goods and his own individual goods shipped on the same vessels in his own name, making no distinction, in the manner of such insurance, between his individual goods and the consigned goods.

12.

and, therefore, the complainant transferred to the defendants $40,000 of said policies as representing their interest, and also $30,000 of policies which were left in their care (the complainant specifies the policies so assigned.) Of the assigned policies four, amounting to $55,000, were on the cargo of the "Keese," and one, of $15,000, on the cargo of the "Blonde."

12.

Defendants aver that after said insurance was effected by said complainant, the defendants requested him to assign to them as additional or collateral security for the performance of his contract a sufficient amount of policies to make defendants secure. As the policies were payable in lawful money (gold being worth $1.45), the complainant transferred $55,000 of policies on the "Keese," and $15,000 of policies on the "Blonde." Defendants deny that either $40,000 or $30,000 of said policies were transferred for the purposes alleged in the bill, and allege that the whole amount transferred was transferred as collateral or additional security for the performance of complainant's said contract.

13.

The "Blonde" was caught in a storm, and a part of the cargo thrown overboard to save the vessel.

13.

Admitted; and defendants aver that a part of the consigned goods were thrown overboard.

14.

The goods insured in complainant's name had to contribute to the general average $1,463.84, which was paid by complainant—one-half of which was justly chargeable against defendants.

14.

Defendants have no knowledge as to whether said goods had to contribute to the general average, and, therefore, require the complainant to make proof; but admit that complainant told the defendants that he was bound to

contribute said sum, and admit that he paid such sum ; and allege that defendants cannot see and do not admit that complainant's share was such sum, and cannot conjecture why he did not collect whatever sum he paid from the insurance companies. Defendants deny that they were bound under any circumstances to reimburse him in any sum which he rightfully or wrongfully paid in adjusting the general average.

15.

The consigned goods and the individual goods of complainant on the "Blonde" that were saved reached Mexico in a damaged condition.

15.

Defendants have no information as to whether the complainant's individual goods on the "Blonde" arrived in Mexico damaged or not, and, if material, require complainant to make proof.

Defendants are informed and believe that the consigned goods, except those so thrown overboard, reached Mexico in a damaged condition, but are ignorant to what extent they were damaged; and defendants allege that the complainant's account attached to his bill of complaint contains an item of $672.68, charged for repairing the iron battery on the ship "Blonde," being part of the consigned goods, and deny that they are chargeable with any part of such sum paid for repairs, and allege that complainant should look to the insurance companies for reimbursement for such money so expended.

16.

and were sold at great sacrifice by Roberto Boker, agent of the parties in Mexico.

16.

Defendants deny that Roberto Boker was the agent of the defendants, and allege that he was the agent of complainant; and allege on information and belief

17.

and the collections of the proceeds remitted to the defendants, who placed it to complainant's credit in his bank account; but complainant alleges that he has never been able to obtain a settlement of this account and is ignorant what amount of proceeds were collected and so remitted and prays discovery.

that the said battery (being all of the consigned goods on the "Blonde," which arrived in Mexico) was sold in Mexico at a sacrifice. Defendants believe that complainant's individual goods were sold by Roberto Boker in Mexico, but whether at a sacrifice or not the defendants are ignorant, and allege that said Roberto Boker has never accounted or reported said sales to the defendants, but believe that reports of said sales were made by said Roberto Boker to the complainant.

17.

Defendants aver that neither Roberto Boker nor his firm ever rendered an account to defendants of the sale of said battery, but that Roberto Boker or his firm did render such account to the complainant.

Said Roberto Boker or his firm made sundry remittances of complainant's money to the defendants, and all money so remitted was and is credited to said complainant on his bank account; but defendants deny that any of such remittances were remitted as the proceeds of the sale of any particular property, and aver that every such remittance was made as a general remittance of so much of complainant's money. The amount of such remittances so credited to complainant's account was $56,612.22, as stated in the itemized account annexed to the answer. This amount includes all sums ever remitted to the defendants on account of the complainant from Mexico, except the sum of $4,000 in gold (then worth

in currency $4,515), which sum was by direction of the complainant credited on defendants' books on account of a shipment of rifles on the steamer "Wilmington."

18.

The "Keese" was wrecked and her cargo totally lost October 12, 1867.

18.

Admitted.

19.

On October 24, 1867, defendants consigned another bill of goods, consisting of rifles, amounting to $10,175,

19.

Admitted. (These goods were shipped on the steamer "Wilmington.")

20.

which were to be shipped and sold upon the same terms and conditions as the previous consignment.

20.

Said shipment of muskets was made under a contract in the first instance verbal, but afterwards reduced to writing in the shape of two letters, both dated October 24, 1867, and an invoice of the same date. Such letters and invoice are set forth in defendants' answer.

21.

Said rifles reached Mexico and were there sold by Roberto Boker under the direction of the defendants.

21.

Defendants admit that they reached Mexico and that they were taken in charge by Roberto Boker, but deny that any instructions were given him by the defendants, and allege that he took and sold them under instructions from the complainant and as complainant's agent.

22.

Said Roberto Boker remitted the proceeds of the sale, so far as collected, to the defendants.

22.

Defendants aver, on information and belief, that said muskets were sold to the State of Pueblo for $12,000 in Mexican money, and that at the same time said complainant sold to the same purchaser other arms, his individual

property, for the sum of $12,500, making an entire sale of $24,500; and aver that of the said sum complainant collected and received $12,613.21 in part payment, and defendants are not informed whether he ever collected the residue or not; but, as he had no authority from them to sell said muskets on credit, defendants insist that he is bound under his contract to account to them for the entire price of the muskets so sold, to wit, $12,000 in Mexican money, worth at the time of said sale, in New York, $13,000 in currency; and defendants aver that all the remittances made to them by complainant through his agents in Mexico were credited to complainant on his said bank account, except the sum of $4,000 in gold, before mentioned, which was, by direction of complainant, credited on account of said shipment of muskets.

23.

The "Keese" was lost while complainant was on his way to Mexico, and he informed the defendants of the loss by telegram from Havana.

23.

Defendants aver that the "Keese" was lost before the complainant sailed for Mexico; but defendants cannot recollect whether they received notice by such telegram or not.

24.

and defendants began to make proofs of loss and engaged counsel to assist in collecting said policies.

24.

Defendants admit that they began making proofs of loss, and employed counsel with reference to their rights under said assigned policies.

25.

Complainant returned to New York about March 5th, 1868, and soon thereafter it became apparent that the insurance companies would contest payment of the losses.

25.

Admitted.

26.

About March 21st, 1868, the defendants agreed with complainant that the goods lost should be considered as sold to the insurance companies for $40,000 of policies on the "Keese" and $15,000 of policies on the "Blonde." It was further agreed that defendants were to sue in their own names upon all the policies transferred to them and account to the complainant for the surplus of $15,000 which they held on the "Keese."

26.

Defendants deny the making of any such agreement on the 21st of March, or at any other time, but admit that it was understood that defendants should sue in their own names upon all the policies assigned to them as aforesaid. They deny that it was agreed that defendants should account to complainant for the alleged surplus of $15,000; and allege that, in fact, all the policies assigned were held by the defendants as collateral security for the performance by complainant of his contract of September 18, and that there was no understanding or agreement at any time that said policies should be enforced for any other purpose than as such collateral security.

27.

Afterward, on the 27th of March, 1868, the agreement of March 21st was changed, and it was agreed that the cargo on the "Keese" was to be considered as sold to the insurance companies.

27.

Denied.

28.

and that suits should be brought by complainant and the defendants, upon the policies standing in their respective names; but that the litigation upon all the policies should be considered a joint fight and for the mutual benefit of all, and that counsel for each of the parties should attend to the interests of all alike, and that complainant should give his time and attention to the prosecution of the suits, and to the management of affairs connected therewith,

28.

Defendants deny that it was agreed that the litigation should be considered a joint fight for the mutual benefit of all alike, as alleged in said bill; and allege that as the assigned policies were held as collateral for the complainant's performance of his contract, the expense of enforcing them, including attorneys' fees, was to be paid out of the amounts recovered on them. Defendants admit that it was agreed that Mr. Da Costa, defendants' attorney, and Mr. Parsons, complainant's

29.

and that the complainant should withdraw his bank account from Winslow, Lanier & Co. and deposit his money and keep his bank account with the defendants.

attorney, should assist each other in the prosecution of the suits.

29.

Defendants allege that it was proposed by complainant and agreed to by the defendants that complainant should keep his bank account with them and that they should from time to time make reasonable advances to him, and that such advances should be reimbursed by complainant out of the proceeds of the litigation based on the unassigned policies, unless sooner paid by complainant.

30.

and that upon all money advanced by complainant he was to be paid 7 per cent. interest, and defendant was to have the same interest on sums advanced by him.

30.

Defendants deny that there was any agreement between them regarding payment of interest.

31.

It was agreed and understood that complainant should be paid for his services in conducting the suits what his services might be reasonably worth and be reimbursed for all expenses.

31.

Deny that there was any agreement, express or implied, that complainant should be compensated by the defendants for his time or labor expended in the litigation against the insurance companies, or that it was understood or agreed that he should be paid by defendants any proportion of the value of his services; and also the agreement to share in the expenses.

32.

Complainant transferred his bank account from Winslow, Lanier & Co. to defendants on the 27th of March, 1868.

32.

Admitted.

33.

In making such transfer of his bank account, complainant was required to pay $270.10 as commission for collecting £4,000 sterling, for which the defendants agreed to reimburse him.

33.

Defendants deny any knowledge or information of said commission and deny any agreement to reimburse complainant; and allege that when an accounting was had, on May 21, 1869, complainant made no such claim against them.

34.

Actions were brought on all the policies in the name either of complainant or defendants.

34.

Defendants admit that actions were brought on the four assigned policies, but that only three suits were tried, the fourth being compromised; if actions were brought on the unassigned policies, only a portion of such actions were tried.

35.

and the litigation continued until Sept. 13, 1876, when the last collection upon any of the policies was made.

35.

Admitted.

36.

Before that time the complainant had transferred to the defendants all judgments which had been taken in his name, and all policies which before that time were standing in his name.

36.

Admitted.

37.

Said transfers were made at the request of defendants for convenience in settlement.

37.

Defendants admit that such transfers of judgments and policies were made at the request of defendants, but deny that they were made merely for convenience in settlement, and allege that they were made as collateral security for the large sums owed by complainant to defendants on account of the said consignments, and on account of advances made by defendants to complainant for expenses of said litigation and for his personal and family expenses.

38.

All money collected upon said policies went into the hands of defendants.

38.

Denied.

39.

The whole amount so collected by the defendants was $109,126.27.

39.

Defendants admit that they received $106,126.27, but allege that other sums were collected

which never came into their hands, viz., $4,000, being part of the $5,000 collected from the U. S. Lloyds on account of the litigation, the balance only of $1,000 being received by defendants. Defendants allege that of the $33,000 collected from the Atlantic Insurance Co. they received only $22,311.11, the residue being paid to attorneys in the litigation.

40.

The policies on which said amount was collected covered all the goods shipped on the "Keese," including both the consigned goods and the individual goods of complainant. The total amount of insurance on the whole cargo of the "Keese" was $163,000.

40.

Admitted.

41.

Complainant alleged that the interest of the defendants and the complainant in said policy was as $29,337.60 is to $133,662.40, and according to this ratio, the defendants ought (1) to account to complainant for the collections upon said policies, and according to the same ratio (2) to pay their just proportion of the expenses and their proportion of the reasonable value of complainant's services.

41.

Defendants deny that the amounts collected or the expenses of the litigation or the value of complainant's time and labor in attending to the litigation should be divided in said proportions or in any other proportions whatever; and aver that the relationship between the complainant and defendants was such only as arose from the contracts of consignment and such as grew out of the assignment of said four policies as collateral security, as above stated, and this relationship of the parties to each other was never changed or altered, except that as defendants afterwards made large advances to complainant, it was understood that said policies should be held as collateral, as well for said advances as to secure the performance of the original

contract; and after these advances had become large, other collaterals were given and other transfers made as further security.

42.

The litigation with Insurance Company was long and expensive.

42.

Admitted.

43.

The complainant during the nine years of the litigation was compelled to reside for long periods in New York, New Jersey and other places near New York City, at great expense, and to make various expensive journeys; and during the whole of said period from 1868 to 1876 gave the larger part of his time to said litigation.

43.

Defendants deny having any knowledge or information as to any of these allegations.

44.

The complainant expended his time and labor as above in the joint interest of the complainant and defendants and at the request of the defendants.

44.

Defendants deny that the complainant's time and labor was so expended in their joint interest or at the request of the defendants, and aver that they were interested in the success of the litigation, only under their said contracts of Sept. 18, 1867, and by virtue of the policies held by them as collateral security, both for the performance of said contract and for their advances; and defendants allege that the interests of complainant and defendants were, properly speaking, several and not joint, and aver that it was in view of these several interests that defendants requested complainant to give his attention to said litigation.

45.

Complainant's services so rendered were reasonably worth $50,000.

45.

Denied; and defendants allege that the value of complainant's time and services was wholly immaterial, as they were rendered for himself in and about his own business.

46.

That he laid out and expended in said litigation and on the joint account the sum of $229,357.83, including interest, the details of which payments are set out in the complainant's expense account. (Exhibit B.)

46.

Defendants have no knowledge as to whether complainant did pay out such sum, but believe that he paid out large sums of money; but deny that such payments were for the joint account, and allege that they were made on complainant's own account; and defendants insist that they are not chargeable with any of the items of said account of expenses or that of any part or proportion of said items. Said account is made out on the theory that complainant and defendants were jointly interested in said litigation, and upon the assumption that it was agreed that the expenses of the litigation should be defrayed by complainant and defendants according to their supposed respective interest. Defendants aver that the truth is, that the complainant was liable to the defendants on the contract of consignment and that defendants held as collateral security for the performance of said contract the four assigned policies; and that the other litigation in the name of the complainant on the unassigned policies was his own litigation in which defendants had no interest, save such as they acquired by the assignment of said policies pending litigation or by the assignment of judgments.

47.

Complainant avers that in 1872 he insured his life in three policies, for a total amount of $30,000, payable to the defendants.

47.

Defendants admit such insurance for $30,000.00, and allege that each of the said policies was assigned to or made payable to the defendants as collateral security for the complainant's indebtedness, both then existing and thereafter to accrue, by reason of ad-

vances to be made. That the premiums on said policies were paid by the defendants, and that because of the failure of the complainant to pay the premium, said policies lapsed except as to the parts saved by the defendants' payments; that thereafter the defendants caused the policies to be changed into paid-up policies, which they still hold as such collateral security; that the sums paid by them as premiums on account of such policies have been charged and the sums received by them as dividends on said policies have been credited on the bank account of the complainant, and the defendants are ready and willing to assign the policies when complainant's debt to them is discharged.

48.

The policies were placed in defendants' hands in trust, and they agreed *to keep the policies alive* if complainant should not be able.

48.

Denied.

49.

Complainant sets forth a further agreement regarding the insurance policies.

49.

Denied.

50.

The defendants have converted said policies into paid-up policies for less amounts.

50.

Admitted.

51.

The defendants have collected and converted to their own use the dividends paid on such policies and asks an accounting.

51.

Defendants allege that all dividends received have been credited on complainant's bank account.

52.

After the panic in 1873, complainant was in pressing need of money and defendants claimed to

52.

Defendants deny that they ever represented to the complainant that they were unable to reim-

be unable to reimburse him for any part of his expenditures.

burse him for his expenditures, and aver that they never admitted any liability on their part to reimburse him or ever agreed so to do.

53.

Complainant transferred to the defendants a certificate for 20 shares of the Flushing and North Side R.R., to be sold by them or placed to his credit in his bank account.

53.

Admitted.

54.

The defendants failed to sell said stocks, as they might have done, and still refuse to answer for said stocks, and complainant prays an accounting.

54.

Defendants allege that defendants made diligent efforts to sell said stock, but that their efforts were fruitless, because the stock was valueless; that said stock continued wholly valueless until converted into stock of the Flushing, North Shore and Central Railroad Co.; that a certificate of 20 shares of stock in the Flushing, North Shore and Central Railroad Company was issued for complainant in the name of defendant Funke, and the same is still held by said defendants and they are unable to sell the same; that said certificate is subject to the order of the complainant, and defendants are ready and willing, and have always been so, to transfer said stock; but deny that it is true that they might have sold it as alleged in said bill.

55.

The complainant again and again appealed to the defendants to reimburse him somewhat for money expended and advanced by him.

55.

Defendants deny that said complainant appealed to them to reimburse him for money expended and advanced by him, or that he even once made such an appeal as is alleged.

56.

The defendants told complainant that they wished him to con-

56.

Defendants deny that they made this or any like representations

sider the money expended and advanced by him on the joint account as money invested at interest, their share of which they were willing to account to your orator for when the insurance matters were settled.

57.

The defendants were in urgent need of money, and appealed to complainant to furnish them with bonds or other property on which they might raise money, promising out of money so raised to assist the complainant.

58.

The complainant sold and conveyed to the defendants six lots in Indianapolis for the agreed price of $24,000, of which amount the complainant asks an accounting.

to the complainant then or at any time.

57.

Defendants deny that they made such appeals or representations or promise to the complainant.

58.

Denied; and defendants aver that the truth is, that complainant conveyed to one of the defendants six lots as security for his indebtedness then existing and subsequently to accrue; and that said deed was made by complainant and the consideration therein inserted by him without any consultation with the defendants; that thereafter at the request of the defendants, complainant negotiated the sale of said lots partly on credit to the end that the defendants might use the purchase-money mortgages as collaterals in raising money; that complainant received in part payment for said lots five thousand dollars in lumber or other merchandise; that defendants received from the purchaser, one Martindale, notes and mortgages in part payment for the said lots to the amount of $41,799.96, and that said notes have never been paid; that at the time of said conveyance and of said mortgage to Martindale, complainants represented said lots to be worth a large sum

of money, and the defendants supposed said Martindale to be a man of property and solvent; but the complainant then well knew that said Martindale was wholly irresponsible and had no means of paying said notes and that said lots were not worth the purchase money, if indeed they were worth more than the prior mortgages thereon; defendants at various times paid out for taxes and for interest on the prior mortgages the sum of $1,809.69, which sum they charged on complainant's bank account; that thereafter the prior mortgages on said lots were foreclosed, and said lots were sold, and defendants still have said notes and mortgages of said Martindale, which are wholly worthless.

59.

Complainant kept his bank account with the defendants from March 27, 1868, to June 1, 1876.

59.

Admitted; but defendants aver that said bank account did not cease on said first day of June, 1876, but continued, and items both of debit and credit accrued after said date and were properly entered in said bank account.

60.

That his bank account was charged with $42,707.98 paid out on complainant's checks, and a further amount of $39,482.91 paid out, as the defendants pretend for expenses connected with said insurance suits, a considerable part of which payments complainant disputes and denies that they are chargeable to him, and prays that defendants be required to correct the same.

60.

Defendants aver that no items were entered on said bank account except such as were properly chargeable to complainant; that complainant deposited in his bank account $63,636.76, and that defendants paid out on complainant's check, or at his request, $64,605.88, and that on the 21st day of May, 1869, defendants stated and delivered to complainant an account of his said bank account, showing the balance of $969.12 due to defendants, and thereupon complainant closed his

bank account by paying said balance without claiming any interest on deposit and without claiming that defendants were chargeable with any part or proportion of the sums paid out by him as the expenses of litigation; that complainant's pass book of his said bank account was subsequently written up to the first day of June, 1876, and was surrendered to him with his vouchers or checks; that after the rendering of said statement or pass book, the complainant, on or about the 4th day of July, 1876, made objections to three of the items in said statement amounting in the aggregate to $3,300 and to no others; defendants insist that said items were properly chargeable to complainant's bank account, and they explained said items to him in a letter dated July 7, 1876, and that complainant has never either by reply to said letter or otherwise expressed dissatisfaction with said explanation; and defendants aver that the balance of complainant's said bank account due to the defendants is $35,151.81.

61.

The complainant has received no part of the collections on the Marine policies except such as are credited in his bank account.

61.

Defendants aver that said pass book as written up to June 1, 1876, showed that the complainant had been credited with all sums received by defendants from said insurance suits, except the sums received on the four policies assigned to them as security.

62.

On a full and final statement of the foregoing matters there will be due to the complainant a balance of $238,000, including interest to January 1, 1882.

62.

Defendants aver that the balance of said bank account, including interest to May 1, 1882, is $35,151.81; that the sums received by defendants on the four

assigned policies, after deducting the expenses of collecting, were duly credited against the said consigned goods, leaving of that account a balance due the defendants of $12,252.15, exclusive of interest; and that complainant is indebted to the defendants on account of the consignment of 1,000 rifles, $10,375, exclusive of interest, and also for one-half of the proceeds of the sale of said rifles, as to which defendants pray discovery.

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IN THE

United States Supreme Court

HERMAN STURM, *Appellant*,
v.
FERDINAND A. BOKER ET AL., *Appellees*. } No. 13,551.

REPLY BRIEF.

SOLOMON CLAYPOOL,
Solicitor for Appellant.

JOHN M. BUTLER,
WM. A. KETCHAM,
Of Counsel.

Carlon & Hollenbeck, Printers, Indianapolis.

IN THE

United States Supreme Court

HERMAN STURM, *Appellant*,
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REPLY BRIEF.

The position that the bill of complaint is not based upon the contracts of consignment, but on contracts of March 21 and 27, 1868, is not tenable. This is the position taken by the circuit judge. Our present position was not suggested by the district judge. It will be seen that the bill alleges the consignment of September 18 and October 24, of 1867, and alleges the term of the consignment in precise accord with the letters of consignment and in accord with the present position of Sturm showing that both consignments was of the same character. The bill then alleges contracts of March 21 and 27, 1868, touching the commencement and the mode of prosecuting the actions upon the policies, etc. And the bill expressly alleges that the spirit of the agreement of September

18 and of October 24, 1867, under which the goods were consigned as aforesaid, should be maintained. It is suggested that the letters of consignment were not made a part of the complaint. In chancery pleading this was not necessary; all that was needed was to allege the contract, as was done, and the letters were the evidence of the contract.

Gold.

Appellees say in their brief (page 19) that Sturm wishes this court to think that when he testified in the insurance cases that the September invoice was payable in gold, he did not believe that it was payable in gold. Sturm's testimony was in those cases based upon the assurances of Funke, that the bill was gold. He never saw any bill until after the goods were lost, and when he returned from Mexico a bill was shown him with the words "Payable in gold" stamped upon it. He was surprised, and a contention arose about it, and Funke assured him that the bill shown was the original bill and that it was payable in gold. Sturm trusted Funke's veracity and honesty. After this controversy arose Sturm found a copy of the original bill which his brother had mailed to him to Mexico, and this copy did not contain the words "payable in gold." For farther on this subject, see Sturm's first original brief, pages 60, 61 and 62.

Parson's Letter of May 29, 1871.

Brief of appellees says on page 22 that Sturm testified that he had no copy of his answer to this letter, and on page 23 it is said that if Sturm's letter of June

1st had been produced it would certainly show that Sturm did not say that he was not personally liable to the defendants, that is, for the goods. And it is said that Parson's letter of June 3d was in answer to Sturm's letter of June 1st and that Parson's letter proves the assertion just made. We submit that it proves the reverse. If Sturm in his letter of June 1st said that he was not liable, the expression of Parsons in his letter of the 3d, "I have been apprehensive," etc., would naturally follow Sturm's letter—the expression is "I have been." Still Parsons may then have yet thought that Sturm should have farther interview with Boker & Co. upon this subject, and Sturm did have. See Sturm brief, p. 51. It is said that Sturm in the insurance cases swore that he was the owner of the cargo consigned. (Appellee's brief, p. 23.) Sturm testified that the goods were consigned to him. (Appellee's brief, p. 20.) In the Great Western cases, after using the word "owner," he shows farther along what he meant. He did not mean that he was purchaser of the goods. In the bill of October 24th are these words: "Bought of Herman Boker & Co. in joint account." He was responsible for the goods, as he said, that is for their return or for the delivery of the money for them, that is, the proceeds of the sale. Not responsible for their loss at sea. Farther on this subject see his testimony on page 59 of appellant's brief.

AFFIDAVIT OF JULY 14, 1868.

This up to the place where schedule of goods is given, states the contract of consignment in terms substantially the same as the letters of consignment. That the consignment "was free from all and any

shipping expenses by this deponent, said firm " nothing is said about the shipment being *at the risk* of Sturm. If Sturm was then admitting, as the members of the Boker firm testify, he all along admitted that the shipment was at his risk, the affidavit should have so stated, and doubtless would have done so. Sturm's objection to the affidavit was as stated in his letter of October 5, 1868, upon the ground that the language following the schedule of goods was " liable to be misconstrued," and in his said letter he stated what the affidavit ought to contain, but Boker & Co. say this letter is a fabrication. Sturm testifies that he wrote a letter to Boker & Co. on the 15th of July objecting to the affidavit and that he had a letter press copy. The appellees in their brief say on page 27 that there is no such letter in the record. This we think a mistake, although we can not now give a reference. We have a press copy of July 15th which appears in letter book " B," Partridge, No. 2, p. 95, which see. See, also, Sturm's first brief, p. 54 to p. 59. The letter of October 5th is copied in letter book "A," p. 23. Both copies are closely hedged. If position of appellees is true, Sturm forged both — introduced one and omitted the other. As to the alleged indorsement by Parsons on a copy of the above affidavit of July 14, 1868, there is no witness that that is Parsons' handwriting except John Rabing (3 vol., p. 3032, Q. 1729), but if it were admitted it would be a corroboration of the fact that Sturm had an interview with Parsons on that subject, and when Parsons was shown the affidavit it is not likely that he would indicate the real ground of his objection, which was a matter of difference between Sturm and H. Boker & Co. The indorsement was to put the matter off until he could have an interview with Sturm.

Fred Sturm's Letter and Bookkeeping.

Of the Fred Sturm letter, appellees' brief says that it is not evidence against Boker & Co. The contents of the letter is proven to be true as shown in our first brief, beginning on page 12. It is said on page 37 of appellee's brief, that our side shows a consciousness of weakness by referring to the note in the handwriting of Stocking. This being a fact it is certainly proper to point to the fact, to disprove the charge of fabrication against the appellant of perjury against his brother. Woods, Judge, in his opinion said in presence of Gresham, Judge, "I understood the circuit judge to be convinced of the genuineness of these letters referring to the correspondence between Sturm and his brother which included the above Fred Sturm's letter.

Bookkeeping.

As to what is said by appellees under the head of bookkeeping on page 41 of their brief about our want of candor in the treatment of the evidence on the subject of bookkeeping, it will be seen that Funke attempted to excuse his frequent denials of having opened an account with Sturm, by saying he supposed it was a merchandise account that was being inquired after. But the inquiry was general. After their books were called for and produced and showed that an account had been opened in 1868, then followed the above excuse. The fact that they had not opened an account with Sturm was one of the reasons given for not having charged the consigned goods to Sturm. To this very account the consigned goods were charged after the present controversy began. See Sturm's brief, p. 22; also see

Funke, Rec., Vol. 3, p. 2347, X-Q. 1794 to 1805, and see the account. After the above denial of having opened an account, Sturm might reasonably suppose, as he did, that the only account with him was the bank pass-book.

STURM TO H. BOKER & CO., FEBRUARY 8, 1869.
H. BOKER & CO. TO STURM, FEBRUARY 10, 1869.
STURM TO FUNKE, FEBRUARY 8, 1869.

These two letters of Sturm's were written from Washington, one in the morning and the other in the evening. Speaking of the letter written in the morning, and of the above letter dated the 10th, the appellees in their brief, on page 43, say that "there are at least two letters that are unquestioned, which show that the defendants were at no time to be called upon by Sturm for repayment of any part of these expenses." The appellees say that the letter written in the evening was a fabrication. In the letter admitted to be genuine, Sturm said that he had received a letter from Captain Keeny, and that he had answered it, and saying further "I do not know that Keeny's evidence is now indispensible and * * * * I for one am extremely anxious to know *from our counsel* whether it is *absolutely necessary*. Of course *if we keep him* we must pay enough to keep him along, but I want him to understand that we have been to great expense in the matter already, and there must be an end sometime." Boker & Co. acknowledged the receipt of this in their letter of February 10th, authorizing them to pay Keeny "for your account." And saying further, "with regard to further subsidies to be paid to Captain Keeny, we have nothing to say, although our opinion is that he or his

evidence now might be dispensed with, *if you have to pay for it so dearly.*" The position of the appellees is based upon these italicized words. There is just as much force in the other direction in the words "If we keep him," in Sturm's letter. If Boker & Co. had no interest in the matter, why did Sturm write them as he did? And why did they express an opinion about further subsidies to Keeny, as they did? Sturm in his telegram directed the payment to Keeny to be charged to him, because it was a part of the expenses of the litigation, which, according to the agreement between the parties, were to be charged against Sturm as the mode of keeping the joint expense account. Sturm in his evening letter of February 8th speaks of having another letter from Keeny to which he had replied, and saying: "I enclose a press copy of my reply to him." Speaks of Keeny wanting to borrow money, and then adds: "Can you ascertain from DaCosta what we had better do? Parsons says we must have his evidence of course, and it is not wise to take his deposition now. *I have, of course, to pay the greater portion of all these expenses,*" etc. These last words prompted Boker & Co. to make the charge that this letter was fabricated for the purposes of this suit.

When Sturm, on his cross-examination (Rec., Vol. 1, p. 573, X-Q. 1295), was shown his first letter of February 8th, he at once responded that he had a letter-press copy of that letter, and that it was in the handwriting of Sidney Stocking. In this immediate connection Sturm produced a letter-press copy of his other letter of February 8th. A copy of each of these letters will be found in letter book "A," which has been identified as "Partridge No. 3," one on pages 92 and 93, and the other on page 95. Closely interlarded in this same book, on page 99, is a letter of Stocking to Funke,

dated February 9, 1869. Sidney Stocking died years before this controversy arose.

Under the parallel presentation of these two letters, on page 49 of appellee's brief, the brief quotes from the last of these two letters these words: "Parsons says we must have his (Keeney's) evidence, of course," and then adds by way of comment, "But how could Parsons have said so to him during that day? Parsons was in New York, Sturm in Washington." Of course Sturm did not see Parsons during that day. He had had an expression from Parsons before he went to Washington. Though Parsons had made such expressions to Sturm, Sturm might have been anxious in the morning, for reasons given, to know whether both attorneys agreed that Keeny's testimony was indispensible.

ALIBI, MARCH 21, 1868.

In their brief the appellees attempt to show some discrepancies in the testimony of General Sturm touching dates, places and surroundings; when and where conversations were had about the memoranda of March 21st and 27th, 1868. If this were true (but it is not) it would not be more than might reasonably be expected, as the testimony was given more than twelve years after the conversations, and in addition to this such discrepancies as are claimed are not at all material. In addition to what we have said in our first brief, page 29, it would suffice to say that the district judge discredited the above alibi, and in language most emphatic. The circuit judge was silent upon this subject. (See Woods, J., Rec., Vol. 1, p. 109.) We admit that there was a snow storm, but not sufficient to have prevented Funke from going over to New York. If this were so, other witnesses might have been produced to

prove it, as the district judge has well said in his opinion. The testimony of W. L. Seaman, in connection with the diary of his deceased brother, indicating the means of communication between Flushing and New York, does not show at that date there could be no communication. The brothers' diary speaks of a snow storm and added "stayed at home all day." It does not, like Funke's diary, say "Snowed up; stayed at home."

Alibi, June 12–17, 1871.

See our brief, page 31. As we have said, Schumacher did not start on the 10th or the 11th, but on the afternoon of the 12th, to Fortress Monroe. A dispatch from Col. Crispin dated June 13, 1871 (misprinted in Record, Vol. 3, p. 2637, June 17), says: "Schumacher and myself arrived here to-day." McGowan acknowledged the receipt of this dispatch in a letter dated New York, June 14, 1871 (page 2638), saying: "I received your telegram this morning." It is apparent that the telegram of the 13th was sent late, probably a night message, otherwise McGowan would have received it before the 14th. From this it appears that Schumacher arrived at the Fort on the evening of the 13th. He could do this, leaving New York on the afternoon of the 12th, and even make a short stop in Washington.

Alibi of February 2 or 3, 1874.

No attention was given to this in our first brief for the want of time, besides we think what the district judge said on this subject is perfectly conclusive. See Rec., Vol. 1, p. 108, beginning with the words: "First," "The Shelburn Fall case" (last line on page 108 of

Record). Sturm wrote Funke January 3, 1874, that he would be in New York "by the first of February," etc. See Record, Vol. 1, p. 624. Letter of Wood to Sturm dated January 30, 1874, from New York, says: "Mr. Schumacher urgently requests your presence here; he says he wrote you a few days since, requesting you to come to N. Y." See Record, Vol. 2, page 1064, for the letter of Schumacher here referred to strongly urging Sturm to come. See Record, Vol. 1, p. 334. Not time to pursue this subject. See petition for rehearing, page 252.

Wood Contract.

Under this head, in answer to what Sturm's counsel have said on this subject, on pages 35 to 41 of their brief, appellees' counsel say, on page 91 of their brief that, "the defendants testified that they did not see this contract until long after Wood's services had ceased," etc. Why were they so indefinite in this expression as to time? Speak out, gentlemen, and admit the fact that you dare not contest; that the defendants testified, as shown in our brief, that they knew nothing about the Wood contract with Sturm until the trial of the case of Wood against them in 1882, whereas they knew all about the contract and its terms at least as early as September, 1876, when their counsel, under their direction, prepared an affidavit reciting the terms of the contract, and the evidence shows that they knew the contents of this contract from its date in 1872. The defendants knew that their testimony on this subject was false, and yet upon *their* testimony, without corroboration, the court is asked to find numerous forgeries and fabrications against General Sturm.

In this connection we remark that we have not the time, and we do not deem it necessary, to say anything

here in relation to what the appellees have said in their brief (page 92) upon the subject of the offer of compromise by the insurance companies, nor in relation to what is said upon conduct of parties (page 94). We submit these questions upon what we have said in our first brief. We will, however, notice some of the charges of fabrications made in this connection by appellees.

STURM TO FUNKE, SEPTEMBER 18, 1873, NO. 327.

Boker's brief, page 103, says this is fabrication. Sturm, speaking of a letter of this supposed date in answer to question 340 (Vol. 1, p. 331), said he had an impression copy of it, but could not read it, not even the date. Claypool, after this, gave an abstract of a letter of above date. See Boker brief, p. 104. This letter is denied by Schumacher and Rabing. Record, Vol.3, pp. 2928 to 3207. When Sturm was asked about a letter of September 20, 1873, he mentioned the above letter. See Record, Vol.1, p.883, X-Q.3507. Sturm's letter to Funke, September 21, 1873 (copied in Heath copy book), Record, Vol. 3, p. 2985, mentions a telegram from Funke in reply to Sturm's letter of Thursday, which was September 18th, and defendant says if a telegram of that date had not been received from Funke, the letter of the 21st was a fabrication. Sturm, in his cross-examination, produced the dispatch referred to in letter of 21st, and this was done November 24, 1882. See Record, Vol.1, p. 614, X-Q. 1673. On the same day, Boker produced a telegram by Sturm to Funke, dated November 20, 1873. Sturm admitted having sent a dispatch of that character, and being then asked if the dispatch produced by him from Funke was not an answer to Sturm's telegram, Sturm replied at first, "It is possible," and

farther along he said it was his impression that the dispatch which he believed to be dated September 20th was dated November 20th. The face has no date except 20th, and in the hand-writing of Heath it is indorsed on the back September 20th. This indorsement Sturm said he believed a mistake, though he might be mistaken. He farther said he had no doubt about getting a dispatch in answer to his dispatch to Funke. Record, Vol. 1, pp. 622, 623. Now we submit it is more likely there was a mistake in date of telegram, or that two telegrams were received, one as mentioned in the letter of September 21, 1873, than that the letter of September 21st was a fabrication. (Sturm mentioned a telegram of September 20th in his examination in chief. Rec., Vol. 1, p. 331, Q. 337.) This letter of September 21, 1873, was produced in the examination of A. B. Heath by Sturm in June 22, 1883. Rec., Vol. 2, p. 1256, Q. 62. At a later date the impression copy of this letter and many other letters were set out in full in the cross-examination of Schumacher. See Rec., Vol. 3, p. 2985. If Sturm fabricated the letter after his above examination, touching the telegrams, is it probable he would have testified as he did about the telegrams and afterwards produced the fabrications in evidence? Or is it likely, after his above testimony, that he would have made the fabrication and produced it, referring in the fabrication to a date of telegram which, as claimed, he had before admitted to be a mistake?

Now as to what appellees say in their brief on page 111 about a list of letters and telegrams given by Sturm on pages 328–621 of Record, Vol. 1, we submit that on the first page mentioned Sturm only attempts a list of letters and telegrams bearing on a certain subject. On the other page he does not attempt to give a full list of letters by him to Boker & Co. He gives "except the

letters that have been set out in full," etc. There would be nothing strange if there were mistakes in each list, and yet mistakes do not appear. (About press copies of 1873 and 1869 see Record, Vol. 1, p. 614, X-Q. 1670.)

LOTS.

See Boker's brief, page 111 to 126, including the December memoranda of 1874. See petition for rehearing, page 83, sections 58, 59. See letter of December 8, 1874, Boker's brief, page 121. Also Schumacher's to Sturm, February 2, 1875, in connection with the memoranda of December. Sturm gives an explanation of what he meant by giving the lots as security. Record, Vol. 1, p. 341, Q. 388. At the conclusion of his answer to question 256 (Record, Vol. 1, p. 210), Sturm says: "I made a direct sale of these lots to Herman Boker & Co. for the sums first stated, $24,000." On such expression as this the circuit judge based his conclusion that Sturm committed wilful perjury. What precedes shows what the witness meant—that he had made a direct conveyance. This is further evident from the letter of December 8, 1874. The lots were intended to be used to raise money for both parties. The lots were conveyed to Martindale and mortgages taken back so they might be used as collateral in raising money. (Record, Vol. 1, p. 356, Q. 483–486.) Boker's did raise money on these collaterals.

LETTERS OF FEBRUARY 2, 1875.

Schumacher wrote Sturm a letter on this date to which Sturm wrote an answer under the same date, both as printed on pages 67–9 of appellant's brief.

Defendants charge that Sturm's letter is a fabrication. An impression of Sturm's letter was taken in letter-book called "Penn Letter-Book," page 37. This book is said by defendants to be of peculiar character because the preceding pages from 11 to 37 were clipped out. These were clipped by Sturm to be given to Mr. Parsons, his attorney. Record, Vol. 2, p. 1378, Q. 678. The defendants farther say that if Sturm had written such a letter, the friendly relations of the parties would have ceased. No, Herman Boker & Co. under no circumstances would have broken with Sturm before they got all the money collected on the insurance policies into their hands. On page 130 of appellees' brief they claim Schumacher's letters since February, 1875, are consistent with his letter of that date (as they interpret it) and that Sturm's correspondence is inconsistent. Then follows a citation of letters which do not sustain their position. The reverse is true as shown in our brief, page 70. See Schumacher to Sturm, April 1, 1875, quoted on page 73 of our brief. See, also, same to same, September 1, 1875. Rec., Vol. 1, p. 673.

STURM TO SCHUMACHER, APRIL 4, 1875.

Under the heading "Sturm's letter of April 4, 1875," on page 136 of appellees' brief, the defendants say that this letter is spurious. This letter is addressed to Schumacher and says: "Your letter (answered to-day by telegraph) was pleasing to me." The telegram mentioned was produced in evidence by defendants, and Sturm in his testimony produced a written copy of this letter saying that he was not sure that he had a press copy of it. (Rec., Vol. 1, p. 799.) Appellees think it curious that he could produce a copy, and say that

he had a press copy of the telegram. This is not correct. When the telegram was shown him he remarked, "I believe I have a letter-press copy of it." (P. 799.) Said he did not know whether he had a copy of his letter of April 7, 1875. No press copy of either of these papers was found and yet the telegram and the letter of April 7th were produced by defendants and admitted to be genuine. The charge of the letter of April 4th being spurious seemed to be based on the fact that Sturm produced a written copy, having no press copy, and upon the word in the letter of April 7th, "For several days I was going to write to you but my wife was sick." From this the appellees make the deduction that Sturm could not have written a letter on the 4th. Is it likely that Sturm made no acknowledgment of the telegram until the 7th? As for the above written copy, it will suffice to say that it is likely that when the letter of the 4th was written Sturm had not the means of taking a press copy and therefore kept a written copy. This was done in other instances as the evidence shows. If the written copy was spurious why did not Sturm take a press copy of it as he had done in other instances.

Alibis. Sept. 8, 1872, and Oct., 1873.

Evidence was produced by Sturm to the effect that upon a certain occasion about the middle of September, 1872, Mr. Boker dined with Pettis. To disprove this, defendants made an effort to prove that Boker was on his way to Europe at the time mentioned. Funke being asked the date referred to, Rabing, who said "perhaps it's in your diary for that year," and Rabing, being told that it was not, said he would look it up. Vol. 3, pp. 2389, 2390, X-Q. 2156 to 2159, inclusive

(June 5, 1884). Rabing did look it up, and during the testimony of Schumacher said that "Mr. Boker left for Europe on the 8th day of September, 1872, on the steamer 'Rhine,' as I find by looking at the gold-stub, where Herman Boker & Co. drew a check to the order of the agents of that line for $120 in gold, being the passage-money." Rec., Vol. 3, p. 3046, Q. 1756. General Sturm at great trouble and expense found the register of the steamer showing that Boker did not start until the 28th of September.

William P. Wood testified that he was called to the place of business of H. Boker & Co. by a card from them, and Funke directed him to go to the house of Schumacher, who was sick, and he did so, and had an interview as given in answer to Question 385. This was about the 18th of October, 1873. See Record, Vol. 2, p. 1054, Q. 373–390. Schumacher testified that at that time he lived in the country and that Wood never came to his house, saying farther, "He must have had a good, long trip if he did, because I lived in the country at that time—twenty or thirty miles from here." Rec., Vol. 3, p. 2904, Q. 734. To disprove this alibi we refer to Schumacher's letter to Sturm dated October 6, 1873, printed in Vol. 2, p. 1056, Q. 391. In this letter he says, "day after to-morrow we move again to town." October 16, 1873, Naltner telegraphed Boker & Co., saying, "Col. Wood will call." See Record, Vol. 1, p. 637. This telegram Schumacher acknowledged by letter to Naltner dated October 21, 1873, saying, he "had had several conversations with Wood." This letter is set out in the cross-examination of Sturm. X-Q. 1789 (which is omitted from the printed record).

The defendants, beginning on page 141 and proceeding to page 146, cite and review correspondence between

the parties preceding the letter of Sturm to Schumacher, dated August 29, 1875, and letter of Schumacher to Sturm, dated September 1, 1875, cited on page 76, for the purpose of showing that our interpretation of these letters is wrong. And after quoting these two letters on pages 146–7, say that the letters refute our contention. Referring to what Schumacher said in his letter of September 1st about the Albany decision (if favorable) making Sturm "all right," the defendants say that, "so far as Schumacher knew at that date, Sturm owned all of the Atlantic judgment. If he collected it he would have in hand about fifty thousand dollars in money." That this would have made him "all right." Neither this sum, at that date, nor the sum of one hundred thousand dollars at the date of April 1, 1875, as stated by us on page 74 of our brief, would have relieved General Sturm, if the present contention of the defendants is true. For, after Sturm had written in his letter of September 15, 1875, to Schumacher, that he was going to make an assignment, and wanted a statement of his account, Boker came to Indianapolis with an account, showing that Sturm was then in their debt one hundred and forty thousand dollars. In this account they charged Sturm with the goods, and wanted Sturm to adopt it, so as to show that Herman Boker & Co. were the largest creditors. See our brief, p. 76, etc. At that time Sturm was owing thousands of dollars in Indianapolis. Did Boker & Co. suppose then, at that date, a collection of fifty thousand dollars would make Sturm financially "all right?" As to what the defendants say in this connection about the said account for one hundred and forty thousand dollars, we refer to our first brief, pages 77–8–9. They said that Rabing corroborated Boker. Certainly Boker & Co. and their confidential clerk, Rabing, most always corroborated one

another, but nobody else corroborates any of them. They corroborated each other when they testified they knew nothing of the Wood contract until 1882. Their testimony on this subject was willfully false, as already shown. They say that Sturm's letter of September 15, 1875, shows that Sturm knew he was in debt to the defendants. This is simply ludicrous. In that letter Sturm says: "*My debts are few, and I have plenty of property.* My affairs here are in order and very simple. But the New York affairs are somewhat complicated, and as I must include that as well as everything else, I wish that, to avoid an error, you send me a statement of how *I stand with you, according to your books.*" This is construed to be a call for Sturm's indebtedness to Boker & Co. Indebtedness is not required to be included in an assignment, but "credits belonging" to an assignor must be included. Revised Statutes 1881, section 2663. And Sturm was calling for the account that he might show "the credits belonging to him." If he was owing H. Boker & Co. as much as one hundred and forty thousand dollars at that time, there was no credit coming to him from New York. The fact is he wanted to show the balance due him in his New York account. The defendants conceived the idea that they could take advantage of Sturm's financial distress, and induce him, by promise of help, to adopt a false account, and swindle other creditors. And, doubtless, at that date, the appellees had conceived the idea, and had agreed among themselves to assume the position, in the end, that Sturm was their debtor, for the consigned goods. Therefore, without breaking with Sturm, they began, under pretense of being in financial distress, to call for property and securities to reimburse them for their advancements for the prosecution of the insurance cases, intending to get all they could in their hands, and to

retain all they had, so far as they could, without breaking with Sturm. Mr. Schumacher stated their being in distress was a pretext to keep Sturm off.

STURM TO SCHUMACHER, OCTOBER 27, 1875.

This letter notified Schumacher that the Atlantic judgment had been assigned to a bank at Indianapolis. The defendants say that the letter is a fabrication and deny all knowledge of the assignment, and devote much space in their brief to prove Schumacher did not know that the assignment had been made to the bank. See appellee's brief, pages 161 to 167. On the date of October 27 Sturm wrote Funke. Afterwards he received a letter from Schumacher dated October 29, which acknowledges the receipt of "your communications." The appellees contend that the German word for "communications" should be translated in the singular. Whether Schumacher and the defendants had knowledge of the assignment we submit upon our first brief. The letter to Funke was copied in Penn Letter Book "C," identified C. P. Watson, August, 1883, on pages 31, 34. The letter to Schumacher was copied in Penn Letter Book "D," identified November 29, 1882, pages 211 to 215, closely hedged.

Next in their brief the appellees take up the subject of the injunction suit. We submit this on what we have said under this head in our first brief. We have no apprehension that the appellees can, however elaborate, convince this court that their conduct in connection with this matter is consistent with their present position. For if Sturm at this time was owing them over one hundred and forty thousand dollars and they held the judgment as collateral, the plain

thing for them to have done was to answer this fact in the injunction suit.

On page 177 of their brief, the appellees say that Sturm's letter (from Indianapolis to New York) to Parsons of December 23, 1875 (Record, Vol. 1, p. 687), shows that Schumacher's letter (from New York to Indianapolis) of December 22, 1875, had been received. (Record, Vol. 3, p. 2153). This could hardly be in the course of mail, and if Sturm had received the letter of December 22 he would not have written as he did to Parsons saying that "the judgment is now Boker's," etc. This was the position he wanted the parties to assume for reasons given in his letter to Schumacher dated December 23. Sturm thought that under the assignment to them Bokers might assume that they were the owners of the judgment, but at the date of December 2, 1875, DaCosta had advised them that the form of the assignment would not allow this. The word "fatal" as used in the letter of Sturm to Schumacher, December 23, 1875, referred to the subject of the injunction suit, that to base the defense upon the ground that Boker's held the judgment as collateral would be "fatal" because "proofs" would have to be brought in how far you (Boker & Co.) are entitled to it (the judgment), and that would be "fatal." In his letter to Parsons his expression on this subject was to the effect that delay or an unfavorable result would be "fatal" to him, and why,—because the judgment belonged to him and he needed the money speedily to relieve him from debts then pressing him. The appellees, on page 178, ask the question, Would it have been "fatal" to Sturm to have the world know that H. B. & Co. were his debtors in a large sum, as he now pretends to claim they were at that time? Answer. No, but if it had been made to appear that they owed him instead of he them, this would have been

"fatal" in the injunction suit, if the defense had been based on the ground that Boker & Co. held the judgment as a collateral. Besides Sturm does not pretend Boker & Co. owed him as much in December of 1875 as now. The Atlantic judgment of $48,000 and other collections were made since.

Sturm–Funke Testimony.

On this subject, defendant's counsel say, on page 180 of their brief, that what we said on page 84 of our brief "rises little if any above the ridiculous." The use of epithets and such adjectives usually proceeds from the want of anything better or from a wide misconception of the truth. In this connection they quote from the testimony of Sturm giving, from a printed copy thereof, the testimony of Funke in the case of *Funke* v. *The New York Mutual Insurance Co.*, which was tried in March, 1876. The quotation begins on page 348 of Vol. 1, Q. 328, and continues to Q. 435. We wish that it had continued further to Q. 443. We also wish that there had been a quotation from Funke's cross-examination on this subject beginning Vol. 3, p. 2366, X-Q. 1970, and continuing X-Q. 2017. From the latter it appears that the defendants at the date of that trial had an assignment, not only of the Atlantic judgment but of all the claims against the insurance companies, and it will also appear that our brief does not show his testimony as strongly against him as it really is. Nothing but a reading will show its character. After Funke had been served with a subpœna *duces tecum*, there was a conversation between him and Sturm about the three defenses to the injunction which had previously been discussed between the parties and their attorneys, namely: First.

That the defendants were the owners of the Atlantic judgment. Second. That they held it as collateral, and Third. That Sturm was solvent. Funke and Sturm did not agree. Funke had the bank-book written up, took it into court and testified as shown. Sturm was not present in court. After his testimony, Funke and Sturm had a controversy about it. Sturm told him that this bank-book showing a balance against him of thirty-two thousand dollars was not correct, that it did not give him (Sturm) proper credits. In answer to question 441, Vol. 1, p. 351, Sturm said: "I told him that not one particle of credit had been given to me for the moneys that they had received on the first two policies nor for other moneys that they had received." This is true as will appear from the accounts. The fact is that Funke was in an embarrassing situation when he testified in the above case. He tried to ride three horses. He was oscillating between the three different modes of defense to the injunction suit, which were as above stated. He did not wish to commit himself to or against either mode. He said his firm had an assignment of the Atlantic judgment, but did not give the character of the assignment, whether absolute or as a collateral. (Sturm says that all assignments were for convenience of collection.) He (Funke) said that Sturm was owing his firm thirty-two thousand dollars, but Sturm had the means to pay it. To have said otherwise, would have been against "one mode of defense," that Sturm was solvent. Sturm was owing his firm thirty-two thousand dollars but he did not say that they had collaterals. His answer was "none whatever." If the present position of the appellees is correct, that Sturm is chargeable with the lost goods and all expenses of litigation, Sturm at that date owed them much more than thirty-two thousand dollars and

they had "collaterals." If this was and is true, Funke should not have hesitated to have testified to the truth, and certainly not when Sturm was at that time and had been all along, admitting the present position of the defendants, as they every one have testified in this case.

Letter Books.

Sturm gives a reason why he has not been able to furnish some papers; that was because they had been out in different hands, as for instance the First National Bank. (1 Vol., p. 191, Q. 149.) Sturm says during the years 1868 and 1869, while he had an office, he kept copies of letters in his copy book, but after then they were not regularly copied, and those that were copied were copied at different places, where he had business connections, giving the places. (1 Vol., p. 646, X-Q. 1866; p. 803, X-Q. 3029. 2d Vol., p. 1334, Q. 194. See, also, Heath, 2d Vol., p. 1274, X-Q. 121.) The defendants were in the habit of calling for press copies of letters, as we believed, for the purpose of finding whether Sturm had copies of letters which they had in their hands. See a call (1 Vol., p. 802, Q. 3023–30). Sturm's letter-press books were in places clipped, and some of these clippings were doubtless lost, and they were clipped for different purposes. Sturm has some clippings that he can't locate the place where they came from, and the defendant produced the originals of one or more of these clippings.

Defendants, on page 132 of their brief, quote from our brief, page 72, and comment on our quotation from letter of Schumacher, May 18th, 1875 (p. 2161). Defendants say there is nothing in the letters preceding this to show that Sturm was to temporarily reimburse them for advances made. The letters cited say: "You

(Sturm) promised to procure us (Boker & Co.), through a new arrangement, with property, mortgages, etc., to cover our advances," etc. This of itself shows that there was some talk between the parties about Sturm raising money to return advances on mortgages, etc.

Defendants, in brief, page 133 (bottom), say we, in our brief, on page 74, pervert the meaning of Schumacher's letter of April 18, 1875, quoted on page 73 of our brief, saying that these words in that letter, to wit: "Should the matter be successful," do not refer to the subject of compromises. There is ambiguity; but later it appears that Boker & Co. thought that the collection of the Atlantic judgment would make Sturm all right. See letter of Schumacher to Sturm (1 Vol., p. 673, X-Q. 2058).

The appellees, on page 39 of their brief, say that defendants did not deny receiving the telegram from Sturm while he was in Mexico, and they quote from Funke's testimony, given in 1881, to prove this. It will be seen that the testimony of Funke then was equivocal, besides defendants had occasion to often change their testimony, as we have shown, as they did in this case after the Fred Sturm letters were produced (Funke, 1 Vol., p. 979, Q. 174–84). In 1884 Funke was not certain whether he or Stocking got the dispatch (3 Vol., p. 2197, Q. 170–3) (3 Vol., p. 2294, X-Q. 1206–7). Schumacher, in 1884, testified that "I believe Sturm telegraphed to Stocking from (Havana), and Stocking told us about the loss. We did not hear of it direct. This was repeated in question 124. For a corroboration of the testimony of Fred Sturm, Tifft and Southard, on subject of frequent calls of Funke, etc., see letter of Funke to Stocking, dated November 8, 1867.

Mexican Arms Account.

This account is set out in Vol. 3, p. 2560, X-Q. 1034, from which it will appear payments to DaCosta were charged to this account all along and also payment on account of insurance was charged to this account and receipts from policies which Sturm in the beginning had transferred to defendants, were credited to this account.

The first two items in Sturm's bank account—$46.50 and $200—were transferred to Sturm's bank account when that was opened in March, 1868. In this connection see the scratching of defendants' books and change of entries. (Vol. 3, p. 2561 and 2562.)

Sturm's letter of June 20, 1876, to Schumacher, quoted on page 185 of defendant's brief, does not show that Sturm at and before that date had knowledge of collections which had been made about May 26, 1876. To prove that it does, the defendant's counsel assume that the words "the lawyers' statement" refer to the subject of collections. Preceding words, "somehow (bank and others) are laboring under a wrong impression altogether as regards the payment of insurance claims," show that he did not have knowledge at that date. His testimony shows that Sturm had an impression that the item of $22,311.11 were on account of another matter than the policies.

We conclude this brief the evening of the 4th of October, 1893, having up to this time page 197 of defendant's brief. We have not time to devote to the preparation of farther reply.

SOLOMON CLAYPOOL,
Solicitor for Appellant.

JOHN M. BUTLER,
WM. A. KETCHAM,
Of Counsel.

NOTE.—In referring to expert testimony, we have in some parts referred to the printed petition for a re-hearing, which petition in giving abstract of testimony gives the numbers of the question asked and the answers. For greater convenience we here give the pages of the record where the testimony of some of the witnesses will be found whose testimony was abstracted as here stated.

Dr. Jameson, Rec., Vol. 4, p. 3369. About "Memorandum" being put on with stamp, Rec., p. 3372-6. Q. 23-47. See petition 205. About clippings and the relative position of lines of printing and writing, Rec., p. 3458, Q. 739, etc. Petition, p. 207.

Prof. Hurty, Rec., Vol. 4, p. 3492. About clippings and relative position of lines, Rec., p. 3538, Q. 431, etc. See Petition for re-hearing, p. 211, etc.

Prof. Coulter, Rec., Vol. 4, p. 3575. About the appearance of paper, Q. 1-31. About position of lines, Rec., p. 3584, Q. 94-102. And further see questions and answers in petition, p. 216.

These particular references are to farther illustrate the uncertainty of expert testimony, and show how these witnesses of the defendants are in conflict with each other, and to show how frequently they were mistaken about the relative position of lines in cases where their opinions were put to a certain test. The whole subject of the uncertainty of expert testimony will be farther illustrated by reference to the abstract of testimony referring to the word "Memorandum," how it was put on, and to the testimony about how the alleged forgery was committed, etc., beginning on page 179 of the printed petition and going to page 225.

MEXICAN BONDS.

Sturm, at the time he found exhibits "H" and "F," was looking for a receipt for Mexican Bonds. In his cross-examination the defendants asked him if he had a receipt. He said he thought he had, and that he would look for it. For evidence on this subject see printed petition for re-hearing, pp. 162-3.